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Ethan A. Nadelmann

Taking Drugs Seriously
John Kaplan

Can the Borders Be Sealed?
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Missing Children, Misleading Statistics — *Joel Best*

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From Horse Carts to Minimills — *Martin T. Katzman*

What's Wrong with Private Prisons
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The case for legalization

ETHAN A. NADELMANN

WHAT CAN BE DONE about the "drug problem"? Despite frequent proclamations of war and dramatic increases in government funding and resources in recent years, there are many indications that the problem is not going away and may even be growing worse. During the past year alone, more than thirty million Americans violated the drug laws on literally billions of occasions. Drug-treatment programs in many cities are turning people away for lack of space and funding. In Washington, D.C., drug-related killings, largely of one drug dealer by another, are held responsible for a doubling in the homicide rate over the past year. In New York and elsewhere, courts and prisons are clogged with a virtually limitless supply of drug-law violators. In large cities and small towns alike, corruption of policemen and other criminal-justice officials by drug traffickers is rampant.

President Reagan and the First Lady are not alone in supporting increasingly repressive and expensive anti-drug measures, and in believing that the war against drugs can be won. Indeed, no "war" proclaimed by an American leader during the past forty years has garnered such sweeping bipartisan support; on this issue, liberals and conservatives are often indistinguishable. The fiercest disputes

Portions of this article appeared in a somewhat different form in the Spring 1988 issue of Foreign Policy.

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are not over objectives or even broad strategies, but over turf and tactics. Democratic politicians push for the appointment of a "drug czar" to oversee all drug policy, and blame the Administration for not applying sufficient pressure and sanctions against the foreign drug-producing countries. Republicans try to gain the upper hand by daring Democrats to support more widespread drug testing, increasingly powerful law-enforcement measures, and the death penalty for various drug-related offenses. But on the more fundamental issues of what this war is about, and what strategies are most likely to prove successful in the long run, no real debate—much less vocal dissent—can be heard.

If there were a serious public debate on this issue, far more attention would be given to one policy option that has just begun to be seriously considered, but which may well prove more successful than anything currently being implemented or proposed: legalization. Politicians and public officials remain hesitant even to mention the word, except to dismiss it contemptuously as a capitulation to the drug traffickers. Most Americans perceive drug legalization as an invitation to drug-infested anarchy. Even the civil-liberties groups shy away from this issue, limiting their input primarily to the drug-testing debate. The minority communities in the ghetto, for whom repealing the drug laws would promise the greatest benefits, fail to recognize the costs of our drug-prohibition policies. And the typical middle-class American, who hopes only that his children will not succumb to drug abuse, tends to favor any measures that he believes will make illegal drugs less accessible to them. Yet when one seriously compares the advantages and disadvantages of the legalization strategy with those of current and planned policies, abundant evidence suggests that legalization may well be the optimal strategy for tackling the drug problem.

Interestingly, public support for repealing the drug-prohibition laws has traditionally come primarily from the conservative end of the political spectrum: Milton Friedman, Ernest van den Haag, William F. Buckley, and the editors of the *Economist* have all supported it. Less vocal support comes from many liberals, politicians not among them, who are disturbed by the infringements on individual liberty posed by the drug laws. There is also a significant silent constituency in favor of repeal, found especially among criminal-justice officials, intelligence analysts, military interdictors, and criminal-justice scholars who have spent a considerable amount of time thinking about the problem. More often than not, however, job-security considerations, combined with an awareness that they

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can do little to change official policies, ensure that their views remain discreet and off the record.

During the spring of 1988, however, legalization suddenly began to be seriously considered as a policy option; the pros and cons of legalization were discussed on the front pages of leading newspapers and news magazines, and were debated on national television programs. Although the argument for legalization was not new, two factors seem to have been primarily responsible for the blitz of media coverage: an intellectual rationale for legalization—the first provided in decades—appeared in my article in the Spring issue of *Foreign Policy* magazine; more importantly, political legitimacy was subsequently bestowed upon the legalization option when Baltimore Mayor Kurt Schmoke, speaking to the National Conference of Mayors, noted the potential benefits of drug legalization and asked that the merits of legalization be debated in congressional hearings.

The idea of legalizing drugs was quickly denounced by most politicians across the political spectrum; nevertheless, the case for legalization appealed to many Americans. The prominent media coverage lent an aura of respectability to arguments that just a month earlier had seemed to be beyond the political pale. Despite the tendency of many journalists to caricature the legalization argument, at long last the issue had been joined. Various politicians, law-enforcement officials, health experts, and scholars came out in favor of drug legalization—or at least wanted to debate the matter seriously. On Capitol Hill, three or four congressmen seconded the call for a debate. According to some congressional staffers, two dozen additional legislators would have wanted to debate the issue, had the question arisen after rather than before the upcoming elections. Unable to oppose a mere hearing on the issue, Congressman Charles Rangel, chairman of the House Select Committee on Narcotics, declared his willingness to convene his committee in Baltimore to consider the legalization option.

There is, of course, no single legalization strategy. At one extreme is the libertarian vision of virtually no government restraints on the production and sale of drugs or any psychoactive substances, except perhaps around the fringes, such as prohibiting sales to children. At the other extreme is total government control over the production and sale of these goods. In between lies a strategy that may prove more successful than anything yet tried in stemming the problems of drug abuse and drug-related violence, corruption, sickness, and suffering. It is one in which government makes most of the sub-

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stances that are now banned legally available to competent adults, exercises strong regulatory powers over all large-scale production and sale of drugs, makes drug-treatment programs available to all who need them, and offers honest drug-education programs to children. This strategy, it is worth noting, would also result in a net benefit to public treasuries of at least ten billion dollars a year, and perhaps much more.

There are three reasons why it is important to think about legalization scenarios, even though most Americans remain hostile to the idea. First, current drug-control policies have failed, are failing, and will continue to fail, in good part because they are fundamentally flawed. Second, many drug-control efforts are not only failing, but also proving highly costly and counter-productive; indeed, many of the drug-related evils that Americans identify as part and parcel of the "drug problem" are in fact caused by our drug-prohibition policies. Third, there is good reason to believe that repealing many of the drug laws would not lead, as many people fear, to a dramatic rise in drug abuse. In this essay I expand on each of these reasons for considering the legalization option. Government efforts to deal with the drug problem will succeed only if the rhetoric and crusading mentality that now dominate drug policy are replaced by reasoned and logical analysis.

Why current drug policies fail

Most proposals for dealing with the drug problem today reflect a desire to point the finger at those most removed from one's home and area of expertise. New York Mayor Ed Koch, Florida Congressman Larry Smith, and Harlem Congressman Charles Rangel, who recognize government's inability to deal with the drug problem in the cities, are among the most vocal supporters of punishing foreign drug-producing countries and stepping up interdiction efforts. Foreign leaders and U.S. State Department and drug-enforcement officials stationed abroad, on the other hand, who understand all too well why it is impossible to crack down successfully on illicit drug production outside the United States, are the most vigorous advocates of domestic enforcement and demand-reduction efforts within the United States. In between, those agencies charged with drug interdiction, from the Coast Guard and U.S. Customs Services to the U.S. military, know that they will never succeed in capturing more than a small percentage of the illicit drugs being smuggled into the United States. Not surprisingly, they point their fingers in both directions. The solution, they promise, lies in greater source-

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control efforts abroad and greater demand-reduction efforts at home.

Trying to pass the buck is always understandable. But in each of these cases, the officials are half right and half wrong—half right in recognizing that they can do little to affect their end of the drug problem, given the suppositions and constraints of current drug-control strategies; half wrong (if we assume that their finger-pointing is sincere) in expecting that the solution lies elsewhere. It would be wrong, however, to assume that the public posturing of many officials reflects their real views. Many of them privately acknowledge the futility of all current drug-control strategies, and wonder whether radically different options, such as legalization, might not prove more successful in dealing with the drug problem. The political climate pervading this issue is such, however, that merely to ask that alternatives to current policies be considered is to incur a great political risk.

By most accounts, the dramatic increase in drug-enforcement efforts over the past few years has had little effect on the illicit drug market in the United States. The mere existence of drug-prohibition laws, combined with a minimal level of law-enforcement resources, is sufficient to maintain the price of illicit drugs at a level significantly higher than it would be if there were no such laws. Drug laws and enforcement also reduce the availability of illicit drugs, most notably in parts of the United States where demand is relatively limited to begin with. Theoretically, increases in drug-enforcement efforts should result in reduced availability, higher prices, and lower purity of illegal drugs. That is, in fact, what has happened to the domestic marijuana market (in at least the first two respects). But in general the illegal drug market has not responded as intended to the substantial increases in federal, state, and local drug-enforcement efforts.

Cocaine has sold for about a hundred dollars a gram at the retail level since the beginning of the 1980s. The average purity of that gram, however, has increased from 12 to 60 percent. Moreover, a growing number of users are turning to "crack," a potent derivative of cocaine that can be smoked; it is widely sold in ghetto neighborhoods now for five to ten dollars per vial. Needless to say, both crack and the 60 percent pure cocaine pose much greater threats to users than did the relatively benign powder available eight years ago. Similarly, the retail price of heroin has remained relatively constant even as the average purity has risen from 3.9 percent in 1983 to 6.1 percent in 1986. Throughout the southwestern part of

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the United States, a particularly potent form of heroin known as "black tar" has become increasingly prevalent. And in many cities, a powerful synthetic opiate, Dilaudid, is beginning to compete with heroin as the preferred opiate. The growing number of heroin-related hospital emergencies and deaths is directly related to these developments.

All of these trends suggest that drug-enforcement efforts are not succeeding and may even be backfiring. There are numerous indications, for instance, that a growing number of marijuana dealers in both the producer countries and the United States are switching to cocaine dealing, motivated both by the promise of greater profits and by government drug-enforcement efforts that place a premium on minimizing the bulk of the illicit product (in order to avoid detection). It is possible, of course, that some of these trends would be even more severe in the absence of drug laws and enforcement. At the same time, it is worth observing that the increases in the potency of illegal drugs have coincided with decreases in the potency of legal substances. Motivated in good part by health concerns, cigarette smokers are turning increasingly to lower-tar and -nicotine tobacco products, alcohol drinkers from hard liquor to wine and beer, and even coffee drinkers from regular to decaffeinated coffee. This trend may well have less to do with the nature of the substances than with their legal status. It is quite possible, for instance, that the subculture of illicit-drug use creates a bias or incentive in favor of riskier behavior and more powerful psychoactive effects. If this is the case, legalization might well succeed in reversing today's trend toward more potent drugs and more dangerous methods of consumption.

The most "successful" drug-enforcement operations are those that succeed in identifying and destroying an entire drug-trafficking organization. Such operations can send dozens of people to jail and earn the government millions of dollars in asset forfeitures. Yet these operations have virtually no effect on the availability or price of illegal drugs throughout much of the United States. During the past few years, some urban police departments have devoted significant manpower and financial resources to intensive crackdowns on street-level drug dealing in particular neighborhoods. Code-named Operation Pressure Point, Operation Clean Sweep, and so on, these massive police efforts have led to hundreds, even thousands, of arrests of low-level dealers and drug users, and have helped improve the quality of life in the targeted neighborhoods. In most cases, however, drug dealers have adapted relatively easily by moving

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their operations to nearby neighborhoods. In the final analysis, the principal accomplishment of most domestic drug-enforcement efforts is not to reduce the supply or availability of illegal drugs, or even to raise their price; it is to punish the drug dealers who are apprehended, and cause minor disruptions in established drug markets.

The failure of international drug control

Many drug-enforcement officials and urban leaders recognize the futility of domestic drug-enforcement efforts and place their hopes in international control efforts. Yet these too are doomed to fail—for numerous reasons. First, marijuana and opium can be grown almost anywhere, and the coca plant, from which cocaine is derived, is increasingly being cultivated successfully in areas that were once considered inhospitable environments. Wherever drug-eradication efforts succeed, other regions and countries are quick to fill the void; for example, Colombian marijuana growers rapidly expanded production following successful eradication efforts in Mexico during the mid-1970s. Today, Mexican growers are rapidly taking advantage of recent Colombian government successes in eradicating marijuana in the Guajira peninsula. Meanwhile, Jamaicans and Central Americans from Panama to Belize, as well as a growing assortment of Asians and Africans, do what they can to sell their own marijuana in American markets. And within the United States, domestic marijuana production is believed to be a multi-billion-dollar industry, supplying between 15 and 50 percent of the American market.

This push-down/pop-up factor also characterizes the international heroin market. At various points during the past two decades, Turkey, Mexico, Southeast Asia (Burma, Thailand, and Laos), and Southwest Asia (Pakistan, Afghanistan, and Iran) have each served as the principal source of heroin imported into the United States. During the early 1970s, Mexican producers rapidly filled the void created by the Turkish government's successful opium-control measures. Although a successful eradication program during the latter part of the 1970s reduced Mexico's share of the U.S. market from a peak of 87 percent in 1975, it has since retained at least a one-third share in each year. Southwest Asian producers, who had played no role in supplying the American market as late as 1976, were able to supply over half the American market four years later. Today, increasing evidence indicates that drug traffickers are bringing unprecedented quantities of Southeast Asian heroin into the United States.

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So far, the push-down/pop-up factor has played little role in the international cocaine market, for the simple reason that no government has yet pushed down in a significant way. Unlike marijuana- and opium-eradication efforts, in which aerial spraying of herbicides plays a prominent role, coca-eradication efforts are still conducted manually. The long anticipated development and approval of an environmentally safe herbicide to destroy coca plants may introduce an unprecedented push-down factor into the market. But even in the absence of such government pressures, coca growing has expanded rapidly during the past decade within Bolivia and Peru, and has expanded outward into Colombia, Brazil, Ecuador, Venezuela, and elsewhere. Moreover, once eradication efforts do begin, coca growers can be expected to adopt many of the same "guerrilla farming" methods adopted by marijuana and opium growers to camouflage and protect their crops from eradication efforts.

Beyond the push-down/pop-up factor, international source-control efforts face a variety of other obstacles. In many countries, governments with limited resources lack the ability to crack down on drug production in the hinterlands and other poorly policed regions. In some countries, ranging from Colombia and Peru to Burma and Thailand, leftist insurgencies are involved in drug production for either financial or political profit, and may play an important role in hampering government drug-control efforts. With respect to all three of the illicit crops, poor peasants with no comparable opportunities to earn as much money growing legitimate produce are prominently involved in the illicit business. In some cases, the illicit crop is part of a traditional, indigenous culture. Even where it is not, peasants typically perceive little or nothing immoral about taking advantage of the opportunity to grow the illicit crops. Indeed, from their perspective their moral obligation is not to protect the foolish American consumer of their produce but to provide for their families' welfare. And even among those who do perceive participation in the illicit drug market as somewhat unethical, the temptations held out by the drug traffickers often prove overwhelming.

No illicit drug is as difficult to keep out of the United States as heroin. The absence of geographical limitations on where it can be cultivated is just one minor obstacle. American heroin users consume an estimated six tons of heroin each year. The sixty tons of opium required to produce that heroin represent just 2-3 percent of the estimated 2-3,000 tons of illicit opium produced during each of the past few years. Even if eradication efforts combined with what

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often proves to be the opium growers' principal nemesis—bad weather—were to eliminate three-fourths of that production in one year, the U.S. market would still require just 10 percent of the remaining crop. Since U.S. consumers are able and willing to pay more than any others, the chances are good that they would still obtain their heroin. In any event, the prospects for such a radical reduction in illicit opium production are scanty indeed.

As Peter Reuter argues elsewhere in these pages, interdiction, like source control, is largely unable to keep illicit drugs out of the United States. Moreover, the past twenty years' experience has demonstrated that even dramatic increases in interdiction and source-control efforts have little or no effect on the price and purity of drugs. The few small successes, such as the destruction of the Turkish-opium "French Connection" in the early 1970s, and the crackdown on Mexican marijuana and heroin in the late 1970s, were exceptions to the rule. The elusive goal of international drug control since then has been to replicate those unusual successes. It is a strategy that is destined to fail, however, as long as millions of Americans continue to demand the illicit substances that foreigners are willing and able to supply.

The costs of prohibition

The fact that drug-prohibition laws and policies cannot eradicate or even significantly reduce drug abuse is not necessarily a reason to repeal them. They do, after all, succeed in deterring many people from trying drugs, and they clearly reduce the availability and significantly increase the price of illegal drugs. These accomplishments alone might warrant retaining the drug laws, were it not for the fact that these same laws are also responsible for much of what Americans identify as the "drug problem." Here the analogies to alcohol and tobacco are worth noting. There is little question that we could reduce the health costs associated with use and abuse of alcohol and tobacco if we were to criminalize their production, sale, and possession. But no one believes that we could eliminate their use and abuse, that we could create an "alcohol-free" or "tobacco-free" country. Nor do most Americans believe that criminalizing the alcohol and tobacco markets would be a good idea. Their opposition stems largely from two beliefs: that adult Americans have the right to choose what substances they will consume and what risks they will take; and that the costs of trying to coerce so many Americans to abstain from those substances would be enormous. It was the strength of these two beliefs that ultimately led to

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the repeal of Prohibition, and it is partly due to memories of that experience that criminalizing either alcohol or tobacco has little support today.

Consider the potential consequences of criminalizing the production, sale, and possession of all tobacco products. On the positive side, the number of people smoking tobacco would almost certainly decline, as would the health costs associated with tobacco consumption. Although the "forbidden fruit" syndrome would attract some people to cigarette smoking who would not otherwise have smoked, many more would likely be deterred by the criminal sanction, the moral standing of the law, the higher cost and unreliable quality of the illicit tobacco, and the difficulties involved in acquiring it. Nonsmokers would rarely if ever be bothered by the irritating habits of their fellow citizens. The anti-tobacco laws would discourage some people from ever starting to smoke, and would induce others to quit.

On the negative side, however, millions of Americans, including both tobacco addicts and recreational users, would no doubt defy the law, generating a massive underground market and billions in profits for organized criminals. Although some tobacco farmers would find other work, thousands more would become outlaws and continue to produce their crops covertly. Throughout Latin America, farmers and gangsters would rejoice at the opportunity to earn untold sums of gringo greenbacks, even as U.S. diplomats pressured foreign governments to cooperate with U.S. laws. Within the United States, government helicopters would spray herbicides on illicit tobacco fields; people would be rewarded by the government for informing on their tobacco-growing, -selling, and -smoking neighbors; urine tests would be employed to identify violators of the anti-tobacco laws; and a Tobacco Enforcement Administration (the T.E.A.) would employ undercover agents, informants, and wiretaps to uncover tobacco-law violators. Municipal, state, and federal judicial systems would be clogged with tobacco traffickers and "abusers." "Tobacco-related murders" would increase dramatically as criminal organizations competed with one another for turf and markets. Smoking would become an act of youthful rebellion, and no doubt some users would begin to experiment with more concentrated, potent, and dangerous forms of tobacco. Tobacco-related corruption would infect all levels of government, and respect for the law would decline noticeably. Government expenditures on tobacco-law enforcement would climb rapidly into the billions of dollars, even as budget balancers longingly recalled the almost ten billion dollars per year in tobacco taxes earned by the federal and state

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governments prior to prohibition. Finally, the State of North Carolina might even secede again from the Union.

This seemingly far-fetched tobacco-prohibition scenario is little more than an extrapolation based on the current situation with respect to marijuana, cocaine, and heroin. In many ways, our predicament resembles what actually happened during Prohibition. Prior to Prohibition, most Americans hoped that alcohol could be effectively banned by passing laws against its production and supply. During the early years of Prohibition, when drinking declined but millions of Americans nonetheless continued to drink, Prohibition's supporters placed their faith in tougher laws and more police and jails. After a few more years, however, increasing numbers of Americans began to realize that laws and policemen were unable to eliminate the smugglers, bootleggers, and illicit producers, as long as tens of millions of Americans continued to want to buy alcohol. At the same time, they saw that more laws and policemen seemed to generate more violence and corruption, more crowded courts and jails, wider disrespect for government and the law, and more power and profits for the gangsters. Repeal of Prohibition came to be seen not as a capitulation to Al Capone and his ilk, but as a means of both putting the bootleggers out of business and eliminating most of the costs associated with the prohibition laws.

Today, Americans are faced with a dilemma similar to that confronted by our forebears sixty years ago. Demand for illicit drugs shows some signs of abating, but no signs of declining significantly. Moreover, there are substantial reasons to doubt that tougher laws and policing have played an important role in reducing consumption. Supply, meanwhile, has not abated at all. Availability of illicit drugs, except for marijuana in some locales, remains high. Prices are dropping, even as potency increases. And the number of drug producers, smugglers, and dealers remains sizable, even as jails and prisons fill to overflowing. As was the case during Prohibition, the principal beneficiaries of current drug policies are the new and old organized-crime gangs. The principal victims, on the other hand, are not the drug dealers, but the tens of millions of Americans who are worse off in one way or another as a consequence of the existence and failure of the drug-prohibition laws.

All public policies create beneficiaries and victims, both intended and unintended. When a public policy results in a disproportionate magnitude of unintended victims, there is good reason to reevaluate the assumptions and design of the policy. In the case of drug-prohibition policies, the intended beneficiaries are those individuals

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who would become drug abusers but for the existence and enforcement of the drug laws. The intended victims are those who traffic in illicit drugs and suffer the legal consequences. The unintended beneficiaries, conversely, are the drug producers and traffickers who profit handsomely from the illegality of the market, while avoiding arrest by the authorities and the violence perpetrated by other criminals. The unintended victims of drug prohibition policies are rarely recognized as such, however. Viewed narrowly, they are the 30 million Americans who use illegal drugs, thereby risking loss of their jobs, imprisonment, and the damage done to health by ingesting illegally produced drugs; viewed broadly, they are all Americans, who pay the substantial costs of our present ill-considered policies, both as taxpayers and as the potential victims of crime. These unintended victims are generally thought to be victimized by the unintended beneficiaries (i.e., the drug dealers), when in fact it is the drug-prohibition policies themselves that are primarily responsible for their plight.

If law-enforcement efforts could succeed in significantly reducing either the supply of illicit drugs or the demand for them, we would probably have little need to seek alternative drug-control policies. But since those efforts have repeatedly failed to make much of a difference and show little indication of working better in the future, at this point we must focus greater attention on their costs. Unlike the demand and supply of illicit drugs, which have remained relatively indifferent to legislative initiatives, the costs of drug-enforcement measures can be affected—quite dramatically—by legislative measures. What tougher criminal sanctions and more police have failed to accomplish, in terms of reducing drug-related violence, corruption, death, and social decay, may well be better accomplished by legislative repeal of the drug laws, and adoption of less punitive but more effective measures to prevent and treat substance abuse.

Costs to the taxpayer

Since 1981, federal expenditures on drug enforcement have more than tripled—from less than one billion dollars a year to about three billion. According to the National Drug Enforcement Policy Board, the annual budgets of the Drug Enforcement Administration (DEA) and the Coast Guard have each risen during the past seven years from about $220 million to roughly $500 million. During the same period, FBI resources devoted to drug enforcement have increased from $8 million a year to over $100 million; U.S.

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Marshals resources from $26 million to about $80 million; U.S. Attorney resources from $20 million to about $100 million; State Department resources from $35 million to $100 million; U.S. Customs resources from $180 million to over $400 million; and Bureau of Prison resources from $77 million to about $300 million. Expenditures on drug control by the military and the intelligence agencies are more difficult to calculate, although by all accounts they have increased by at least the same magnitude, and now total hundreds of millions of dollars per year. Even greater are the expenditures at lower levels of government. In a 1987 study for the U.S. Customs Service by Wharton Econometrics, state and local police were estimated to have devoted 18 percent of their total investigative resources, or close to five billion dollars, to drug-enforcement activities in 1986. This represented a 19 percent increase over the previous year's expenditures. All told, 1987 expenditures on all aspects of drug enforcement, from drug eradication in foreign countries to imprisonment of drug users and dealers in the United States, totalled at least ten billion dollars.

Of course, even ten billion dollars a year pales in comparison with expenditures on military defense. Of greater concern than the actual expenditures, however, has been the diversion of limited resources—including the time and energy of judges, prosecutors, and law-enforcement agents, as well as scarce prison space—from the prosecution and punishment of criminal activities that harm far more innocent victims than do violations of the drug laws. Drug-law violators account for approximately 10 percent of the roughly 800,000 inmates in state prisons and local jails, and more than one-third of the 44,000 federal prison inmates. These proportions are expected to increase in coming years, even as total prison populations continue to rise dramatically.[1] Among the 40,000 inmates in New York State prisons, drug-law violations surpassed first-degree robbery in 1987 as the number one cause of incarceration, accounting for 20 percent of the total prison population. The U.S. Sentencing Commission has estimated that, largely as a consequence of the Anti-Drug Abuse Act passed by Congress in 1986, the proportion of federal inmates incarcerated for drug violations will rise from one-third of the 44,000 prisoners sentenced to federal-prison terms today to one-half of the 100,000 to 150,000 federal prisoners anticipated in fifteen years. The direct costs of building and maintaining enough

[1] The total number of state and federal prison inmates in 1975 was under 250,000; in 1980 it was 350,000; and in 1987 it was 575,000. The projected total for 2000 is one million. (See John DiIulio's article in this issue.)

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prisons to house this growing population are rising at an astronomical rate. The opportunity costs, in terms of alternative social expenditures foregone and other types of criminals not imprisoned, are perhaps even greater.[2]

During each of the last few years, police made about 750,000 arrests for violations of the drug laws. Slightly more than three-quarters of these have not been for manufacturing or dealing drugs, but solely for possession of an illicit drug, typically marijuana. (Those arrested, it is worth noting, represent little more than 2 percent of the thirty million Americans estimated to have used an illegal drug during the past year.) On the one hand, this has clogged many urban criminal-justice systems: in New York City, drug-law violations last year accounted for more than 40 percent of all felony indictments—up from 25 percent in 1985; in Washington, D.C., the figure was more than 50 percent. On the other hand, it has distracted criminal-justice officials from concentrating greater resources on violent offenses and property crimes. In many cities, law enforcement has become virtually synonymous with drug enforcement.

Drug laws typically have two effects on the market in illicit drugs. The first is to restrict the general availability and accessibility of illicit drugs, especially in locales where underground drug markets are small and isolated from the community. The second is to increase, often significantly, the price of illicit drugs to consumers. Since the costs of producing most illicit drugs are not much different from the costs of alcohol, tobacco, and coffee, most of the price paid for illicit substances is in effect a value-added tax created by their criminalization, which is enforced and supplemented by the law-enforcement establishment, but collected by the drug traffickers. A report by Wharton Econometrics for the President's Commission on Organized Crime identified the sale of illicit drugs as the source of more than half of all organized crime revenues in 1986, with the marijuana and heroin business each providing over seven billion dollars, and the cocaine business over thirteen billion. By contrast, revenues from cigarette bootlegging, which persists principally because of differences among states in their cigarette-tax rates, were estimated at 290 million dollars. If the marijuana, cocaine, and heroin markets were legal, state and federal governments would collect billions of dollars annually in tax revenues. Instead, they

[2] It should be emphasized that the numbers cited do not include the many inmates sentenced for "drug-related" crimes such as acts of violence committed by drug dealers, typically against one another, and robberies committed to earn the money needed to pay for illegal drugs.

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expend billions on what amounts to a subsidy of organized crime and unorganized criminals.

Drugs and crime

The drug/crime connection is one that continues to resist coherent analysis, both because cause and effect are so difficult to distinguish and because the role of the drug-prohibition laws in causing and labelling "drug-related crime" is so often ignored. There are four possible connections between drugs and crime, at least three of which would be much diminished if the drug-prohibition laws were repealed. First, producing, selling, buying, and consuming strictly controlled and banned substances is itself a crime that occurs billions of times each year in the United States alone. In the absence of drug-prohibition laws, these activities would obviously cease to be crimes. Selling drugs to children would, of course, continue to be criminal, and other evasions of government regulation of a legal market would continue to be prosecuted; but by and large the drug/crime connection that now accounts for all of the criminal-justice costs noted above would be severed.

Second, many illicit-drug users commit crimes such as robbery and burglary, as well as drug dealing, prostitution, and numbers running, to earn enough money to purchase the relatively high-priced illicit drugs. Unlike the millions of alcoholics who can support their habits for relatively modest amounts, many cocaine and heroin addicts spend hundreds and even thousands of dollars a week. If the drugs to which they are addicted were significantly cheaper—which would be the case if they were legalized—the number of crimes committed by drug addicts to pay for their habits would, in all likelihood, decline dramatically. Even if a legal-drug policy included the imposition of relatively high consumption taxes in order to discourage consumption, drug prices would probably still be lower than they are today.

The third drug/crime connection is the commission of crimes—violent crimes in particular—by people under the influence of illicit drugs. This connection seems to have the greatest impact upon the popular imagination. Clearly, some drugs do "cause" some people to commit crimes by reducing normal inhibitions, unleashing aggressive and other antisocial tendencies, and lessening the sense of responsibility. Cocaine, particularly in the form of crack, has gained such a reputation in recent years, just as heroin did in the 1960s and 1970s, and marijuana did in the years before that. Crack's reputation for inspiring violent behavior may or may not be more deserved

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than those of marijuana and heroin; reliable evidence is not yet available. No illicit drug, however, is as widely associated with violent behavior as alcohol. According to Justice Department statistics, 54 percent of all jail inmates convicted of violent crimes in 1983 reported having used alcohol just prior to committing their offense. The impact of drug legalization on this drug/crime connection is the most difficult to predict. Much would depend on overall rates of drug abuse and changes in the nature of consumption, both of which are impossible to predict. It is worth noting, however, that a shift in consumption from alcohol to marijuana would almost certainly contribute to a decline in violent behavior.

The fourth drug/crime link is the violent, intimidating, and corrupting behavior of the drug traffickers. Illegal markets tend to breed violence—not only because they attract criminally-minded individuals, but also because participants in the market have no resort to legal institutions to resolve their disputes. During Prohibition, violent struggles between bootlegging gangs and hijackings of booze-laden trucks and sea vessels were frequent and notorious occurrences. Today's equivalents are the booby traps that surround some marijuana fields, the pirates of the Caribbean looking to rip off drug-laden vessels en route to the shores of the United States, and the machine-gun battles and executions carried out by drug lords —all of which occasionally kill innocent people. Most law-enforcement officials agree that the dramatic increases in urban murder rates during the past few years can be explained almost entirely by the rise in drug-dealer killings.

Perhaps the most unfortunate victims of the drug-prohibition policies have been the law-abiding residents of America's ghettos. These policies have largely proven futile in deterring large numbers of ghetto dwellers from becoming drug abusers, but they do account for much of what ghetto residents identify as the drug problem. In many neighborhoods, it often seems to be the aggressive gun-toting drug dealers who upset law-abiding residents far more than the addicts nodding out in doorways. Other residents, however, perceive the drug dealers as heroes and successful role models. In impoverished neighborhoods, they often stand out as symbols of success to children who see no other options. At the same time, the increasingly harsh criminal penalties imposed on adult drug dealers have led to the widespread recruitment of juveniles by drug traffickers. Formerly, children started dealing drugs only after they had been using them for a while; today the sequence is often reversed: many children start using illegal drugs now only after working for older drug

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dealers. And the juvenile-justice system offers no realistic options for dealing with this growing problem.

The conspicuous failure of law-enforcement agencies to deal with this drug/crime connection is probably most responsible for the demoralization of neighborhoods and police departments alike. Intensive police crackdowns in urban neighborhoods do little more than chase the menace a short distance away to infect new areas. By contrast, legalization of the drug market would drive the drug-dealing business off the streets and out of the apartment buildings, and into legal, government-regulated, tax-paying stores. It would also force many of the gun-toting dealers out of business, and would convert others into legitimate businessmen. Some, of course, would turn to other types of criminal activities, just as some of the bootleggers did following Prohibition's repeal. Gone, however, would be the unparallelled financial temptations that lure so many people from all sectors of society into the drug-dealing business.

The costs of corruption

All vice-control efforts are particularly susceptible to corruption, but none so much as drug enforcement. When police accept bribes from drug dealers, no victim exists to complain to the authorities. Even when police extort money and drugs from traffickers and dealers, the latter are in no position to report the corrupt officers. What makes drug enforcement especially vulnerable to corruption are the tremendous amounts of money involved in the business. Today, many law-enforcement officials believe that police corruption is more pervasive than at any time since Prohibition. In Miami, dozens of law-enforcement officials have been charged with accepting bribes, stealing from drug dealers, and even dealing drugs themselves. Throughout many small towns and rural communities in Georgia, where drug smugglers en route from Mexico, the Caribbean, and Latin America drop their loads of cocaine and marijuana, dozens of sheriffs have been implicated in drug-related corruption. In New York, drug-related corruption in one Brooklyn police precinct has generated the city's most far-reaching police-corruption scandal since the 1960s. More than a hundred cases of drug-related corruption are now prosecuted each year in state and federal courts. Every one of the federal law-enforcement agencies charged with drug-enforcement responsibilities has seen an agent implicated in drug-related corruption.

It is not difficult to explain the growing pervasiveness of drug-related corruption. The financial temptations are enormous relative

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to other opportunities, legitimate or illegitimate. Little effort is required. Many police officers are demoralized by the scope of the drug traffic, their sense that many citizens are indifferent, and the fact that many sectors of society do not even appreciate their efforts—as well as the fact that many of the drug dealers who are arrested do not remain in prison. Some police also recognize that enforcing the drug laws does not protect victims from predators so much as it regulates an illicit market that cannot be suppressed, but can be kept underground. In every respect, the analogy to Prohibition is apt. Repealing the drug-prohibition laws would dramatically reduce police corruption. By contrast, the measures currently being proposed to deal with the growing problem, including better funded and more aggressive internal investigations, offer relatively little promise.

Among the most difficult costs to evaluate are those that relate to the widespread defiance of the drug-prohibition laws: the effects of labelling as criminals the tens of millions of people who use drugs illicitly, subjecting them to the risks of criminal sanction, and obliging many of these same people to enter into relationships with drug dealers (who may be criminals in many more senses of the word) in order to purchase their drugs; the cynicism that such laws generate toward other laws and the law in general; and the sense of hostility and suspicion that many otherwise law-abiding individuals feel toward law-enforcement officials. It was costs such as these that strongly influenced many of Prohibition's more conservative opponents.

Physical and moral costs

Perhaps the most paradoxical consequence of the drug laws is the tremendous harm they cause to the millions of drug users who have not been deterred from using illicit drugs in the first place. Nothing resembling an underground Food and Drug Administration has arisen to impose quality control on the illegal-drug market and provide users with accurate information on the drugs they consume. Imagine that Americans could not tell whether a bottle of wine contained 6 percent, 30 percent, or 90 percent alcohol, or whether an aspirin tablet contained 5 or 500 grams of aspirin. Imagine, too, that no controls existed to prevent winemakers from diluting their product with methanol and other dangerous impurities, and that vineyards and tobacco fields were fertilized with harmful substances by ignorant growers and sprayed with poison-

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ous herbicides by government agents. Fewer people would use such substances, but more of those who did would get sick. Some would die.

The above scenario describes, of course, the current state of the illicit drug market. Many marijuana smokers are worse off for having smoked cannabis that was grown with dangerous fertilizers, sprayed with the herbicide paraquat, or mixed with more dangerous substances. Consumers of heroin and the various synthetic substances sold on the street face even severer consequences, including fatal overdoses and poisonings from unexpectedly potent or impure drug supplies. More often than not, the quality of a drug addict's life depends greatly upon his or her access to reliable supplies. Drug-enforcement operations that succeed in temporarily disrupting supply networks are thus a double-edged sword: they encourage some addicts to seek admission into drug-treatment programs, but they oblige others to seek out new and hence less reliable suppliers; the result is that more, not fewer, drug-related emergencies and deaths occur.

Today, over 50 percent of all people with AIDS in New York City, New Jersey, and many other parts of the country, as well as the vast majority of AIDS-infected heterosexuals throughout the country, have contracted the disease directly or indirectly through illegal intravenous drug use. Reports have emerged of drug dealers beginning to provide clean syringes together with their illegal drugs. But even as other governments around the world actively attempt to limit the spread of AIDS by and among drug users by instituting free syringe-exchange programs, state and municipal governments in the United States resist following suit, arguing that to do so would "encourage" or "condone" the use of illegal drugs. Only in January 1988 did New York City approve such a program on a very limited and experimental basis. At the same time, drug-treatment programs remain notoriously underfunded, turning away tens of thousands of addicts seeking help, even as billions of dollars more are spent to arrest, prosecute, and imprison illegal drug sellers and users. In what may represent a sign of shifting priorities, the President's Commission on AIDS, in its March 1988 report, emphasized the importance of making drug-treatment programs available to all in need of them. In all likelihood, however, the criminal-justice agencies will continue to receive the greatest share of drug-control funds.

Most Americans perceive the drug problem as a moral issue and draw a moral distinction between use of the illicit drugs and use of alcohol and tobacco. Yet when one subjects this distinction to rea-

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soned analysis, it quickly disintegrates. The most consistent moral perspective of those who favor drug laws is that of the Mormons and the Puritans, who regard as immoral any intake of substances to alter one's state of consciousness or otherwise cause pleasure: they forbid not only the illicit drugs and alcohol, but also tobacco, caffeine, and even chocolate. The vast majority of Americans are hardly so consistent with respect to the propriety of their pleasures. Yet once one acknowledges that there is nothing immoral about drinking alcohol or smoking tobacco for non-medicinal purposes, it becomes difficult to condemn the consumption of marijuana, cocaine, and other substances on moral grounds. The "moral" condemnation of some substances and not others proves to be little more than a prejudice in favor of some drugs and against others.

The same false distinction is drawn with respect to those who provide the psychoactive substances to users and abusers alike. If degrees of immorality were measured by the levels of harm caused by one's products, the "traffickers" in tobacco and alcohol would be vilified as the most evil of all substance purveyors. That they are perceived instead as respected members of our community, while providers of the no more dangerous illicit substances are punished with long prison sentences, says much about the prejudices of most Americans with respect to psychoactive substances, but little about the morality or immorality of their activities.

Much the same is true of gun salesmen. Most of the consumers of their products use them safely; a minority, however, end up shooting either themselves or someone else. Can we hold the gun salesman morally culpable for the harm that probably would not have occurred but for his existence? Most people say no, except perhaps where the salesman clearly knew that his product would be used to commit a crime. Yet in the case of those who sell illicit substances to willing customers, the providers are deemed not only legally guilty, but also morally reprehensible. The law does not require any demonstration that the dealer knew of a specific harm to follow; indeed, it does not require any evidence at all of harm having resulted from the sale. Rather, the law is predicated on the assumption that harm will inevitably follow. Despite the patent falsity of that assumption, it persists as the underlying justification for the drug laws.

Although a valid moral distinction cannot be drawn between the licit and the illicit psychoactive substances, one can point to a different kind of moral justification for the drug laws: they arguably reflect a paternalistic obligation to protect those in danger of succumbing to their own weaknesses. If drugs were legally available, most people

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would either abstain from using them or would use them responsibly and in moderation. A minority without self-restraint, however, would end up harming themselves if the substances were more readily available. Therefore, the majority has a moral obligation to deny itself legal access to certain substances because of the plight of the minority. This obligation is presumably greatest when children are included among the minority.

At least in principle, this argument seems to provide the strongest moral justification for the drug laws. But ultimately the moral quality of laws must be judged not by how those laws are intended to work in principle, but by how they function in practice. When laws intended to serve a moral end inflict great damage on innocent parties, we must rethink our moral position.

Because drug-law violations do not create victims with an interest in notifying the police, drug-enforcement agents rely heavily on undercover operations, electronic surveillance, and information provided by informants. These techniques are indispensable to effective law enforcement, but they are also among the least palatable investigative methods employed by the police. The same is true of drug testing: it may be useful and even necessary for determining liability in accidents, but it also threatens and undermines the right of privacy to which many Americans believe they are entitled. There are good reasons for requiring that such measures be used sparingly.

Equally disturbing are the increasingly vocal calls for people to inform not only on drug dealers but also on neighbors, friends, and even family members who use illicit drugs. Government calls on people not only to "just say no," but also to report those who have not heeded the message. Intolerance of illicit-drug use and users is heralded not only as an indispensable ingredient in the war against drugs, but also as a mark of good citizenship. Certainly every society requires citizens to assist in the enforcement of criminal laws. But societies—particularly democratic and pluralistic ones—also rely strongly on an ethic of tolerance toward those who are different but do no harm to others. Overzealous enforcement of the drug laws risks undermining that ethic, and encouraging the creation of a society of informants. This results in an immorality that is far more dangerous in its own way than that associated with the use of illicit drugs.

The benefits of legalization

Repealing the drug-prohibition laws promises tremendous advantages. Between reduced government expenditures on enforcing drug

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laws and new tax revenue from legal drug production and sales, public treasuries would enjoy a net benefit of at least ten billion dollars a year, and possibly much more. The quality of urban life would rise significantly. Homicide rates would decline. So would robbery and burglary rates. Organized criminal groups, particularly the newer ones that have yet to diversify out of drugs, would be dealt a devastating setback. The police, prosecutors, and courts would focus their resources on combatting the types of crimes that people cannot walk away from. More ghetto residents would turn their backs on criminal careers and seek out legitimate opportunities instead. And the health and quality of life of many drug users—and even drug abusers—would improve significantly.

All the benefits of legalization would be for naught, however, if millions more Americans were to become drug abusers. Our experience with alcohol and tobacco provides ample warnings. Today, alcohol is consumed by 140 million Americans and tobacco by 50 million. All of the health costs associated with abuse of the illicit drugs pale in comparison with those resulting from tobacco and alcohol abuse. In 1986, for example, alcohol was identified as a contributing factor in 10 percent of work-related injuries, 40 percent of suicide attempts, and about 40 percent of the approximately 46,000 annual traffic deaths in 1983. An estimated eighteen million Americans are reported to be either alcoholics or alcohol abusers. The total cost of alcohol abuse to American society is estimated at over 100 billion dollars annually. Alcohol has been identified as the direct cause of 80,000 to 100,000 deaths annually, and as a contributing factor in an additional 100,000 deaths. The health costs of tobacco use are of similar magnitude. In the United States alone, an estimated 320,000 people die prematurely each year as a consequence of their consumption of tobacco. By comparison, the National Council on Alcoholism reported that only 3,562 people were known to have died in 1985 from use of all illegal drugs combined. Even if we assume that thousands more deaths were related in one way or another to illicit drug abuse but not reported as such, we are still left with the conclusion that all of the health costs of marijuana, cocaine, and heroin combined amount to only a small fraction of those caused by tobacco and alcohol.

Most Americans are just beginning to recognize the extensive costs of alcohol and tobacco abuse. At the same time, they seem to believe that there is something fundamentally different about alcohol and tobacco that supports the legal distinction between those two substances, on the one hand, and the illicit ones, on the other.

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The most common distinction is based on the assumption that the illicit drugs are more dangerous than the licit ones. Cocaine, heroin, the various hallucinogens, and (to a lesser extent) marijuana are widely perceived as, in the words of the President's Commission on Organized Crime, "inherently destructive to mind and body." They are also believed to be more addictive and more likely to cause dangerous and violent behavior than alcohol and tobacco. All use of illicit drugs is therefore thought to be abusive; in other words, the distinction between use and abuse of psychoactive substances that most people recognize with respect to alcohol is not acknowledged with respect to the illicit substances.

Most Americans make the fallacious assumption that the government would not criminalize certain psychoactive substances if they were not in fact dangerous. They then jump to the conclusion that any use of those substances is a form of abuse. The government, in its effort to discourage people from using illicit drugs, has encouraged and perpetuated these misconceptions—not only in its rhetoric but also in its purportedly educational materials. Only by reading between the lines can one discern the fact that the vast majority of Americans who have used illicit drugs have done so in moderation, that relatively few have suffered negative short-term consequences, and that few are likely to suffer long-term harm.

The evidence is most persuasive with respect to marijuana. U.S. drug-enforcement and health agencies do not even report figures on marijuana-related deaths, apparently because so few occur. Although there are good health reasons for children, pregnant women, and some others not to smoke marijuana, there still appears to be little evidence that occasional marijuana consumption does much harm. Certainly, it is not healthy to inhale marijuana smoke into one's lungs; indeed, the National Institute on Drug Abuse (NIDA) has declared that "marijuana smoke contains more cancer-causing agents than is found in tobacco smoke." On the other hand, the number of joints smoked by all but a very small percentage of marijuana smokers is a tiny fraction of the twenty cigarettes a day smoked by the average cigarette smoker; indeed, the average may be closer to one or two joints a week than one or two a day. Note that NIDA defines a "heavy" marijuana smoker as one who consumes at least two joints "daily." A heavy tobacco smoker, by contrast, smokes about forty cigarettes a day.

Nor is marijuana strongly identified as a dependence-causing substance. A 1982 survey of marijuana use by young adults (eighteen to twenty-five years old) found that 64 percent had tried mari-

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juana at least once, that 42 percent had used it at least ten times, and that 27 percent had smoked in the last month. It also found that 21 percent had passed through a period during which they smoked "daily" (defined as twenty or more days per month), but that only one-third of those currently smoked "daily" and only one-fifth (about 4 percent of all young adults) could be described as heavy daily users (averaging two or more joints per day). This suggests that daily marijuana use is typically a phase through which people pass, after which their use becomes more moderate.

Marijuana has also been attacked as the "gateway drug" that leads people to the use of even more dangerous illegal drugs. It is true that people who have smoked marijuana are more likely than people who have not to try, use, and abuse other illicit substances. It is also true that people who have smoked tobacco or drunk alcohol are more likely than those who have not to experiment with illicit drugs and to become substance abusers. The reasons are obvious enough. Familiarity with smoking cigarettes, for instance, removes one of the major barriers to smoking marijuana, which is the experience of inhaling smoke into one's lungs. Similarly, familiarity with altering one's state of consciousness by consuming psychoactive substances such as alcohol or marijuana decreases the fear and increases the curiosity regarding other substances and "highs." But the evidence also indicates that there is nothing inevitable about the process. The great majority of people who have smoked marijuana do not become substance abusers of either legal or illegal substances. At the same time, it is certainly true that many of those who do become substance abusers after using marijuana would have become abusers even if they had never smoked a joint in their life.

Dealing with drugs' dangers

The dangers associated with cocaine, heroin, the hallucinogens, and other illicit substances are greater than those posed by marijuana, but not nearly so great as many people seem to think. Consider the case of cocaine. In 1986 NIDA reported that over 20 million Americans had tried cocaine, that 12.2 million had consumed it at least once during 1985, and that nearly 5.8 million had used it within the past month. Among those between the ages of eighteen and twenty-five, 8.2 million had tried cocaine, 5.3 million had used it within the past year, 2.5 million had used it within the past month, and 250,000 had used it weekly. Extrapolation might suggest that a quarter of a million young Americans are potential problem users.

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But one could also conclude that only 3 percent of those between the ages of eighteen and twenty-five who had ever tried the drug fell into that category, and that only 10 percent of those who had used cocaine monthly were at risk. (The NIDA survey did not, it should be noted, include people residing in military or student dormitories, prison inmates, or the homeless.)

All of this is not to deny that cocaine is a potentially dangerous drug, especially when it is injected, smoked in the form of crack, or consumed in tandem with other powerful substances. Clearly, tens of thousands of Americans have suffered severely from their abuse of cocaine, and a tiny fraction have died. But there is also overwhelming evidence that most users of cocaine do not get into trouble with the drug. So much of the media attention has focused on the small percentage of cocaine users who become addicted that the popular perception of how most people use cocaine has become badly distorted. In one survey of high school seniors' drug use, the researchers questioned recent cocaine users, asking whether they had ever tried to stop using cocaine and found that they couldn't. Only 3.8 percent responded affirmatively, in contrast to the almost 7 percent of marijuana smokers who said they had tried to stop and found they couldn't, and the 18 percent of cigarette smokers who answered similarly. Although a similar survey of adult users would probably reveal a higher proportion of cocaine addicts, evidence such as this suggests that only a small percentage of people who use cocaine end up having a problem with it. In this respect, most people differ from monkeys, who have demonstrated in experiments that they will starve themselves to death if provided with unlimited cocaine.

With respect to the hallucinogens such as LSD and psilocybic mushrooms, their potential for addiction is virtually nil. The dangers arise primarily from using them irresponsibly on individual occasions. Although many of those who have used one or another of the hallucinogens have experienced "bad trips," others have reported positive experiences, and very few have suffered any long-term harm.

Perhaps no drugs are regarded with as much horror as the opiates, and in particular heroin, which is a concentrated form of morphine. As with most drugs, heroin can be eaten, snorted, smoked, or injected. Most Americans, unfortunately, prefer injection. There is no question that heroin is potentially highly addictive, perhaps as addictive as nicotine. But despite the popular association of heroin use with the most down-and-out inhabitants of urban ghettos, heroin

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causes relatively little physical harm to the human body. Consumed on an occasional or regular basis under sanitary conditions, its worst side effect, apart from addiction itself, is constipation. That is one reason why many doctors in early twentieth-century America saw opiate addiction as preferable to alcoholism, and prescribed the former as treatment for the latter when abstinence did not seem a realistic option.

It is important to think about the illicit drugs in the same way we think about alcohol and tobacco. Like tobacco, many of the illicit substances are highly addictive, but can be consumed on a regular basis for decades without any demonstrable harm. Like alcohol, most of the substances can be, and are, used by most consumers in moderation, with little in the way of harmful effects; but like alcohol, they also lend themselves to abuse by a minority of users who become addicted or otherwise harm themselves or others as a consequence. And as is the case with both the legal substances, the psychoactive effects of the various illegal drugs vary greatly from one person to another. To be sure, the pharmacology of the substance is important, as is its purity and the manner in which it is consumed. But much also depends upon not only the physiology and psychology of the consumer, but also his expectations regarding the drug, his social milieu, and the broader cultural environment —what Harvard University psychiatrist Norman Zinberg has called the "set and setting" of the drug. It is factors such as these that might change dramatically, albeit in indeterminate ways, were the illicit drugs made legally available.

Can legalization work?

It is thus impossible to predict whether legalization would lead to much greater levels of drug abuse, and exact costs comparable to those of alcohol and tobacco abuse. The lessons that can be drawn from other societies are mixed. China's experience with the British opium pushers of the nineteenth century, when millions became addicted to the drug, offers one worst-case scenario. The devastation of many native American tribes by alcohol presents another. On the other hand, the legal availability of opium and cannabis in many Asian societies did not result in large addict populations until recently. Indeed, in many countries U.S.-inspired opium bans imposed during the past few decades have paradoxically contributed to dramatic increases in heroin consumption among Asian youth. Within the United States, the decriminalization of marijuana by

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about a dozen states during the 1970s did not lead to increases in marijuana consumption. In the Netherlands, which went even further in decriminalizing cannabis during the 1970s, consumption has actually declined significantly. The policy has succeeded, as the government intended, in making drug use boring. Finally, late nineteenth-century America was a society in which there were almost no drug laws or even drug regulations—but levels of drug use then were about what they are today. Drug abuse was considered a serious problem, but the criminal-justice system was not regarded as part of the solution.

There are, however, reasons to believe that none of the currently illicit substances would become as popular as alcohol or tobacco, even if they were legalized. Alcohol has long been the principal intoxicant in most societies, including many in which other substances have been legally available. Presumably, its diverse properties account for its popularity—it quenches thirst, goes well with food, and promotes appetite as well as sociability. The popularity of tobacco probably stems not just from its powerful addictive qualities, but from the fact that its psychoactive effects are sufficiently subtle that cigarettes can be integrated with most other human activities. The illicit substances do not share these qualities to the same extent, nor is it likely that they would acquire them if they were legalized. Moreover, none of the illicit substances can compete with alcohol's special place in American culture and history.

An additional advantage of the illicit drugs is that none of them appears to be as insidious as either alcohol or tobacco. Consumed in their more benign forms, few of the illicit substances are as damaging to the human body over the long term as alcohol and tobacco, and none is as strongly linked with violent behavior as alcohol. On the other hand, much of the damage caused today by illegal drugs stems from their consumption in particularly dangerous ways. There is good reason to doubt that many Americans would inject cocaine or heroin into their veins even if given the chance to do so legally. And just as the dramatic growth in the heroin-consuming population during the 1960s leveled off for reasons apparently having little to do with law enforcement, so we can expect a levelling-off—which may already have begun—in the number of people smoking crack. The logic of legalization thus depends upon two assumptions: that most illegal drugs are not so dangerous as is commonly believed; and that the drugs and methods of consumption that are most risky are unlikely to prove appealing to many people, precisely because they are so obviously dangerous.

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Perhaps the most reassuring reason for believing that repeal of the drug-prohibition laws will not lead to tremendous increases in drug-abuse levels is the fact that we have learned something from our past experiences with alcohol and tobacco abuse. We now know, for instance, that consumption taxes are an effective method of limiting consumption rates. We also know that restrictions and bans on advertising, as well as a campaign of negative advertising, can make a difference. The same is true of other government measures, including restrictions on time and place of sale, prohibition of consumption in public places, packaging requirements, mandated adjustments in insurance policies, crackdowns on driving while under the influence, and laws holding bartenders and hosts responsible for the drinking of customers and guests. There is even some evidence that government-sponsored education programs about the dangers of cigarette smoking have deterred many children from beginning to smoke.

Clearly it is possible to avoid repeating the mistakes of the past in designing an effective plan for legalization. We know more about the illegal drugs now than we knew about alcohol when Prohibition was repealed, or about tobacco when the anti-tobacco laws were repealed by many states in the early years of this century. Moreover, we can and must avoid having effective drug-control policies undermined by powerful lobbies like those that now protect the interests of alcohol and tobacco producers. We are also in a far better position than we were sixty years ago to prevent organized criminals from finding and creating new opportunities when their most lucrative source of income dries up.

It is important to stress what legalization is not. It is not a capitulation to the drug dealers—but rather a means to put them out of business. It is not an endorsement of drug use—but rather a recognition of the rights of adult Americans to make their own choices free of the fear of criminal sanctions. It is not a repudiation of the "just say no" approach—but rather an appeal to government to provide assistance and positive inducements, not criminal penalties and more repressive measures, in support of that approach. It is not even a call for the elimination of the criminal-justice system from drug regulation—but rather a proposal for the redirection of its efforts and attention.

There is no question that legalization is a risky policy, since it may lead to an increase in the number of people who abuse drugs. But that is a risk—not a certainty. At the same time, current drug-control policies are failing, and new proposals promise only to be

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more costly and more repressive. We know that repealing the drug-prohibition laws would eliminate or greatly reduce many of the ills that people commonly identify as part and parcel of the "drug problem." Yet legalization is repeatedly and vociferously dismissed, without any attempt to evaluate it openly and objectively. The past twenty years have demonstrated that a drug policy shaped by exaggerated rhetoric designed to arouse fear has only led to our current disaster. Unless we are willing to honestly evaluate our options, including various legalization strategies, we will run a still greater risk: we may never find the best solution for our drug problems.

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Taking drugs seriously

JOHN KAPLAN

IT WOULD BE difficult to deny that the efforts and resources expended in our attempt to prevent the production of heroin and cocaine in other countries, and to keep out of the United States those drugs that are produced, have passed the point of diminishing returns. The outcry over drugs in the newspapers and on the political hustings, and a look at what is occurring in many public-housing projects and in the large lower-class black and Hispanic neighborhoods of our central cities, should be enough to convince sober observers that our present drug policies have simply not been successful enough.

Of course, there are politicians who still argue that our drug problems can be substantially improved by further attempts to push the Colombian, Mexican, Burmese, and other governments toward greater efforts. But with the military and internal strength they have at their disposal, they are doing about as well as one could expect.

Nor is the related demand to increase the use of our army or navy to stop drug smuggling a more likely source of improvement. The ingenuity of smugglers, the tremendous volume of legitimate trade, and the huge number of individuals crossing our borders make it impracticable to achieve the kind of increases in the interdiction rate that would make heroin and cocaine significantly less available or more expensive in the United States.

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The problem, then, for those who realize that our present efforts have bogged down, is what to do. In this respect, drug policy must proceed by elimination. None of the policy options is attractive. All involve great costs—either in expenditures on law enforcement or in damage to public health. Since no option is without severe disadvantages, we can aim only to choose the policy that is least bad.

At one level, the simplest solution would be simply to get out of the way, legalize heroin and cocaine, and allow their sale as we do alcohol's. Until recently this was rarely advocated in print, though for years one would hear such recommendations in private conversation with intellectuals. Now, however, the legalization movement is becoming respectable, and even popular.

A repeal of drug prohibition?

Probably the central problem with the solution of legalization is that it ignores basic pharmacology. There is such a thing as a dangerous drug, and both heroin and cocaine undoubtedly fall into this category. It is here, of course, that the alcohol analogy is usually brought up. The analogy is indeed suggestive, because alcohol is by any standard a dangerous drug as well. And when we repealed Prohibition, we replaced a legal ban on alcohol similar to that now imposed on heroin and cocaine with a system of legal, controlled sale, presumably much like that contemplated for heroin and cocaine. There is no doubt that legalization has attractions. When Prohibition was repealed, the enormous inflow of profits to organized crime and the large-scale corruption of public officials caused by the illegal alcohol traffic dropped sharply. And the large number of civil-liberties violations by Prohibition agents ceased as well.

Several factors, however, made the repeal of Prohibition a much better social decision than would be the case with heroin or cocaine. Hard as it is to believe, the social cost of maintaining Prohibition was not only greater than that which heroin and cocaine currently impose upon us, it was even greater than that imposed by what is now our greatest drug problem—alcohol. Although the addict criminality caused by the high price of heroin and cocaine seems to have had no counterpart in the case of alcohol, the strain on our institutions was far greater. Corruption in the United States during Prohibition approximated that which we now associate with many Third World countries. It is true that the heroin and cocaine trades have corrupted many local police, some prosecutors, and a few local judges. During Prohibition, however, things were much worse. Federal judges, federal and state prosecutors, and countless politicians—

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from congressmen and state governors to mayors, city councilmen, and chiefs of police—were in the pay of bootleggers.

Part of the difference is due to the passage of time. Wave upon wave of reform has made our government a far more honest one in the last fifty years. Perhaps more important is the fact that both before and during Prohibition, alcohol use was common among all social classes and in virtually every area of the nation, and had a much better "image" than heroin and cocaine do today. A society where many people in all walks of life considered themselves drinkers made this activity far more respectable than the use of "hard drugs" is today. And, of course, when an activity is more socially acceptable, it becomes easier for government agents to accept bribes and favors to allow it to continue.

The strain and social costs atrributed to Prohibition were not the only factors justifying the legalization of alcohol. The majority of drinkers enjoyed the use of alcohol without any harm to themselves or society. In a sense, the legalization of alcohol represented the willingness of these drinkers to shoulder their share of the social costs of legalized alcohol.

Nonetheless, the example of alcohol control illustrates a basic rule concerning all attempts to minimize the damage caused by habit-forming and destructive drugs. The principle also applies to a number of consensual (somewhat inaccurately called "victimless") crimes, such as gambling and prostitution. When one of these behaviors is made criminal, its enforcement is not particularly effective; it saddles the criminal-justice system with huge costs; it feeds organized criminal gangs; it causes official corruption; and it leads to large numbers of violations of civil liberties. Finally, the law does not really solve the problems of those engaging in the activity.

On the other hand, the legalization of the behavior produces an increase in the behavior, which can produce a public-health problem of enormous magnitude. Prohibition, for example, despite its faults—including the fact that it was not strictly enforced—did lower the amount of drinking in the United States. The comparative figures for cirrhosis of the liver demonstrate this clearly. With the repeal of Prohibition, both the number of drinkers and their per capita consumption of alcohol gradually but substantially increased, leading eventually to one of our major public-health problems—alcoholism. According to most estimates, alcoholism results in somewhere between 50,000 and 200,000 deaths per year. And regardless of whether the yearly social cost of alcoholism amounts to forty

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billion dollars or one hundred and ten billion dollars (two frequently cited figures), no one would deny that the social cost of alcohol use far exceeds that of all illegal drugs together. The issue then is not whether we were correct in legalizing alcohol or tobacco (I would strongly argue that we were), but what we should do about the drugs that are currently illegal.

A prescription system?

Of course, criminalization and legalization are not the only possibilities. We are probably correct in using a prescription system for valium, for example, which is quite a dangerous drug—but also a useful one. When heroin addicts in England consisted overwhelmingly of middle-aged, middle-class men and women who had become addicted during the course of medical treatment, a prescription system was successfully used to dispense the drug. (Sale without a prescription was a rather serious crime.) However, when an increasingly higher percentage of those addicted came to be more like American addicts—lower-class, criminal, and thrill-seeking—the "British system" was abandoned. England stopped using the prescription system for more than a tiny and diminishing number of addicts, adopting instead a legal-control method much like that used in the United States.

In any event, no one seems to be arguing for a prescription system to control our major illegal drugs. If marijuana, cocaine, and heroin have legitimate medical uses (and the possibility that heroin is better than morphine at relieving intractable pain is the subject of heated debate, with most of the evidence apparently arguing against its superiority), then a prescription system seems most suitable. In fact, this is already being done: we allow prescriptions for medical use of cocaine and THC, the major active ingredient in marijuana.

Though we can regard heroin addiction itself as a disease, and hence a possible candidate for a prescription system, the problems in making such a system work seem insurmountable, as the British have discovered. The sizable pool of non-addicted heroin users forms a ready market for diverted prescribed heroin; the ranks of the addicted would thus swell. (It is impossible for a physician to determine how much heroin an addict really "needs," since this amount varies enormously over time.) Moreover, another drug—methadone—that is available by prescription (although only under certain conditions) is seen, both in the United States and in Britain, as

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much preferable to heroin for the medical treatment of heroin addiction.

The most important reason, however, why a prescription system for marijuana, cocaine, or heroin is just as inappropriate as it would be for alcohol and tobacco is that people generally use these drugs because they want to, and not to cure their ailments. We may be able to treat them and convince them not to use these drugs, but providing these drugs through prescription is not the way to do it.

If the choice for each of the "recreational" drugs is between criminalization and some kind of legalization, then it must be made on a drug-by-drug basis, as was the case with alcohol and tobacco (and coffee, for that matter), taking into account such variables as the pharmacological makeup of each drug and the cost of attempting to suppress it.

This is not an issue to be decided by John Stuart Mill's "simple principle"—that is, by letting each person decide for himself. No nation in the world follows his rule regarding self-harming conduct, and the rule is probably unworkable in a complex, industrial society—particularly one that is a welfare state. Mill's principle, moreover, seems singularly inappropriate when it is applied to a habit-forming, psychoactive drug that alters the user's perspective as to postponement of gratification and his desire for the drug itself.

No surrender?

On the other hand, certain arguments against legalization are even less impressive. Mill's principle, after all, is on the whole a rather sensible injunction to government, which tends—almost by reflex—to attempt to forbid any activity that it regards as harmful, immoral, or deviant. Far less sensible is the idea, advanced by Jesse Jackson and echoed by A. M. Rosenthal of the *New York Times*, that "you do not win a war by surrendering." Obviously, surrender is sometimes the better course. We did it with alcohol, and, if we go back further, we did it in many states with tobacco. (And in the international arena both we, in Vietnam, and the Soviet Union, in Afghanistan, seem to have improved our respective positions by abandoning a war.)

The non-pragmatic, no-surrender arguments are often coupled with warnings about the consequences of legalization. Such arguments, however, are insubstantial—particularly when compared with the serious arguments with which we should be grappling. Take Rosenthal's *Times* argument: "How can we continue to fight

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against alcoholism and tobacco addiction," asks Rosenthal, "if we suddenly say that other drugs—even more dangerous—should be made available?" This is not persuasive. First, virtually every scientist who has looked at the issue would acknowledge that one of the illegal drugs—marijuana—is certainly no more dangerous than alcohol. Second, the argument is a *non sequitur*. Legalizing drugs thought to be more dangerous than alcohol and tobacco might well make it even easier to convince alcohol and tobacco users that legalization does not guarantee that these drugs are safe. The educational message of treating what are patently dangerous drugs the same way we treat alcohol might be valuable for yet another reason. Many people still fail to understand that, by virtually any definition, alcohol is a drug. Treating alcohol the same way we treat cocaine and heroin might help drive this point home to many drinkers.

A similar fallacy lies behind a more common and somewhat more general argument—that legalization of a formerly illegal drug "sends the wrong message" to the public, implying that the drug is safe. The fact is that when Prohibition was enacted alcohol was regarded as dangerous, and Prohibition was not repealed because we changed our minds and decided that alcohol was safe. We all grew up believing that tobacco was habit-forming and stunted one's growth, at the very least. People who chose to drink and smoke did not do so because they believed that no one could be hurt by such behavior or that the government gave them its blessing. The simple increase in availability seems to account for all the increase in drug use when a drug is legalized. After all, those who use dangerous drugs that the public condemns tend not to be highly aware of the nuances of governmental messages.

As a result, the issue boils down to a careful weighing of the costs of criminalization of each drug against the public-health costs we could expect if that drug were to become legally available.

I will not consider the case of marijuana. It is the most used of the three major illegal drugs (although its use has decreased considerably in the last decade); but at present marijuana is also the least socially costly of the illegal drugs, in addition to being the drug that has been most effectively interdicted (because of its relatively large bulk). Finally, marijuana is the drug that promises the lowest public-health costs if legalized.

Various commentators have considered the social costs of marijuana's criminalization and the projected public-health costs of legalization. And though they have been shouted down by parent groups and those who seek their votes, these commentators, by and

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large, have leaned toward legalization. The report of the National Academy of Sciences Committee on Substance Abuse and Habitual Behavior made a rather conservative recommendation: it merely asserted that "the current policies directed at controlling the supply of marijuana should be seriously reconsidered."

Nor need we devote any attention to LSD, mescaline, PCP, or any number of other illegal drugs here; for the illegal status of these drugs has not created a significant social problem.

Needless to say, this is not the case with heroin and cocaine. The costs of restricting supply of these drugs are substantial. Since space does not permit discussions of both heroin and cocaine, I will discuss only the anticipated costs of legalizing cocaine. First, a reasonable calculation of the public-health costs of heroin legalization, based on our admittedly inadequate information, already exists.[1] Second, since cocaine is far more prevalent than heroin, it imposes greater social costs upon us—from the amount of money flowing into criminal syndicates to the number of users arrested for predatory crimes. Third, there seems to be widespread public agreement—although it is probably mistaken—that cocaine is the more benign of the two drugs.

The case of cocaine

At a minimum, it is clear that anyone advocating the legalization of cocaine would have to make a serious estimate of how many more people would use the drug after it was legalized; how many of these users would become dependent on the drug; and how much harm this would cause them and society. Instead, there has been no serious discussion of all this. Moreover, no one has seriously considered the impact of a "new" drug upon a culture that has yet to develop patterns of self-control with respect to its use; by contrast, we should recall that over many generations our culture has developed a variety of informal controls over alcohol use, which allow most people to lessen the harm that alcohol does both to them in particular and society in general. Societies not accustomed to alcohol, however, such as England prior to the "gin epidemic" of the late seventeenth and early eighteenth centuries, and many Native American and Eskimo cultures, have experienced a public-health catastrophe of huge proportions as a result of the introduction of distilled spirits.

[1] See my *The Hardest Drug: Heroin and Public Policy* (University of Chicago Press, 1983).

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Nor have the advocates of the legalization of cocaine considered how we would be able to prevent teenagers from gaining access to the now legal drug. Many people assume that legalization of a drug would affect only adults, since, as with alcohol, we would make it illegal to sell the drug to minors. The problem, however, is that legal access for adults makes a drug *de facto* available to the young. This has been the experience with alcohol and tobacco. Cocaine is far less bulky and more concealable than alcohol, and its use does not leave the telltale aroma of smoke; thus it would be even more difficult to keep away from minors.

Yet another problem is the possibility of changes in public consciousness and values. Such changes can make use of a drug less dangerous, but they can also greatly augment its dangers. There are many examples of changes in public consciousness, entirely apart from governmental action, that have influenced drug use. The use of tobacco, alcohol, and marijuana seems to have dropped in the last several years, just as jogging and low-fat diets have increased, all as a consequence of the nation's greater fixation on health. Unfortunately, we cannot guarantee that such cultural trends will continue, or even that they will not be reversed, as has often happened in the past.

Youth culture, moreover, seems to be subject to dramatic fluctuations. The rapid changes in styles of dress, hair, music, and entertainment among the young have bewildered their elders for generations; and the appearance of a charismatic proselytizer for cocaine (as Timothy Leary was for LSD and marijuana) could change youth attitudes toward cocaine. Such a cultural change, even if only temporary, could present us with a permanent problem of large numbers of young people who became drug-dependent during the period of the drug's "window of acceptability."

Consider the case of heroin. Though most people have not noticed, the epidemic of heroin use stopped about ten years ago. Each year, the average age of heroin addicts goes up by about a year. Nevertheless, the last heroin epidemic has left us with an endemic problem of about 500,000 addicts who impose large social costs upon us.

The dangers of cocaine

This is not to say that problems like these cannot be solved, or that more careful thought and research might not satisfy us. As far as we now know, however, there is no particular cause for comfort. The pharmacological nature of cocaine, in fact, is especially worri-

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some. We need not list all the serious negative effects cocaine may have on its users, since an impressive list of such effects can be drawn up for any of the psychoactive drugs. The problem is to determine just how prevalent these effects would be if the drug were legalized.

With cocaine, we do not have to consider the relatively rare stoppages of the heart muscle or the incidence of strokes; the common effects of cocaine are the most appropriate reasons for concern. The most important fact about cocaine is that it is an extremely attractive drug. In the 1950s a double-blind experiment on the "enjoyability" of a number of injected drugs was undertaken with twenty normal volunteers. Although fewer than half of the subjects found heroin or morphine euphoric, fully 90 percent liked an amphetamine (which is a pharmocological relative of cocaine), giving it by far the highest "pleasure score."

Probably related to its "pleasure score" is the fact that cocaine is the most "reinforcing" drug known to us. Animal studies corroborate the reports of many human users. Over the past four decades, self-administration equipment has been developed that permits animals to "work" for supplies of a drug and to administer all they want. It turns out that opiates such as heroin lie somewhere between alcohol and cocaine in their reinforcing power. Alcohol seems relatively unattractive; it is quite difficult to get most animals to drink alcohol, and unless they are already addicted, monkeys and many other animals will go to some length to avoid ingesting alcohol. Virtually all monkeys, however, will continue injecting themselves with opiates until they become addicted, and even nonaddicted animals will perform considerable amounts of work to "earn" their injections. But cocaine is the most impressive drug in this respect: animals will do enormous amounts of work to earn their cocaine shots. Indeed, if permitted, they will hit at their levers again and again to gain their reward of cocaine, neglecting food or rest until they die of debilitation.

This problem is exacerbated by several other properties of cocaine. Along with amphetamines, it is one of the few drugs that can improve one's mental and physical performance of a task. In fact, this improvement is limited to performance under conditions of fatigue, and the improvement is only temporary. Nonetheless, there will be many occasions during work, athletics, or studies when an individual will be willing to mortgage his future for a little more energy and mental clarity. Moreover—and in this respect unlike amphetamines—cocaine not only produces an alert high, but also

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subsequently causes a noticeable low, a kind of depression after its relatively short-term course has been run. This rather unusual effect results in the urge to use the drug again, both to re-create the past enjoyable high and to fight off the present dysphoric low.

The damage wrought by heavy cocaine use in terms of psychiatric symptoms and general debilitation is now widely known. What is less appreciated are the more subtle changes that regular cocaine use can cause. Unlike alcohol and heroin, cocaine use can easily be integrated with everyday activities. Its use can be quite inconspicuous, and, like cigarette smoking, can accompany a host of everyday activities. Cocaine use makes one feel good, then highly competent, then nearly omnipotent. It is easy to see why the use of such a drug would be damaging in a complex, mechanized, and interdependent society such as ours.

Nor should we take much comfort from the fact that most of those who use cocaine today have not become dependent upon the drug. As long as the drug is expensive and relatively difficult to procure, most of its users will be able to avoid dependence. When the drug is easily available, however, we can expect the temptations toward use to increase considerably.

We can see this by doing a quick calculation. Once the nonfinancial cost of cocaine (that is, incovenience and criminal danger to the user) is greatly reduced by legalization, the drug's financial cost looms as the dominating one. At present, a gram of cocaine sells for about $80-$100. Its cost of production is certainly less than three dollars. Presumably, legalized cocaine would be taxed as heavily as possible, though the cost including tax would have to be sufficiently low, so as to make bootlegging unprofitable. Profits in today's cocaine trade are so huge, though, that it is hard to believe that we could keep the retail price of a gram of cocaine above $20. (Keep in mind that the bootlegger, who tries only to cheat the government out of its tax receipts, is treated much more leniently by both the criminal-justice system and society than is the universally maligned drug pusher.) When one considers that there are about fifty "hits" of cocaine in a gram, one is startled by the realization that at $20 per gram the cost of a hit will be only forty cents—a figure well within the budget of almost all grade-school children. Nor is the specter of very young children destroyed by the use of cocaine in any way unrealistic; there are ten-year-old cocaine addicts on the streets of Bogota today.

It is true that if the number of those dependent upon cocaine merely doubled, we would arguably be well ahead of the game,

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considering the large costs imposed by treating those users as criminals. But what if there were a fifty-fold increase in the number of those dependent on cocaine? We simply cannot guarantee that such a situation would not come to pass; since we cannot do so, it is the height of irresponsibility to advocate risking the future of the nation.

If all this is not enough to convince reasonably prudent people that legalizing cocaine is too risky a course, we can also consider the consequences of taking the risk and being wrong. After all, if we had legalized cocaine five years ago, we would not have known how easy it is to make cocaine into "crack," universally considered to be a much more habit-forming and dangerous form of the drug. If we legalize cocaine now, how long should we wait before deciding whether we made a mistake? And if we decided that we had, how would we go about recriminalizing the drug? By then, substantial inventories of legal cocaine would have been built up in private hands, and large numbers of new users would have been introduced to the drug. And once a drug has been made legally available, it is very difficult to prohibit it. This consideration helps to explain why Prohibition failed, and also explains why almost no one advocates the criminalization of tobacco.

Finding a solution

The problem, then, is what we can do about the present situation. Several factors have made our drug policy politically tolerable up to now. First, it has protected most of middle-class America from the kind of continuous exposure to the use of drugs (and encouragement favoring their use) that are most likely to lead to the problems of drug abuse; such exposure and encouragement characterize the underclass areas in which drug use is endemic. Second, although drug enforcement has been expensive, it would have been even more expensive to do more. Third, we have continued to entertain hopes that we could solve our drug problem on the cheap, either by pressuring other nations to prevent the production of illegal drugs or by keeping drugs from being smuggled into the United States.

If we were to choose to take our drug problem more seriously, it is not clear what we could do. According to public-opinion polls, education is currently the most popular method for dealing with our drug problem. A recent Gallup Poll showed that 47 percent of Americans believe it is the best antidrug strategy. (Thirty-six percent favor interdiction, and 6 percent favor drug treatment.)

Our research shows that it is doubtful that education can do much to lower the level of drug abuse, however. Newspaper adver-

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tising campaigns to discourage alcohol abuse and drug use have been shown to be ineffective. We have had experience with temperance campaigns, but as far as we can tell, most young people do not appear to pay much attention to them. Nor do school-based programs seem to be able to reduce alcohol and drug abuse.

This is predictable. Young people are notoriously resistant to their elders' efforts to get them to live less risky, more forward-looking lives. Well into adolescence, they tend to retain what psychiatrists refer to as "remnants of infantile omnipotence." Moreover, entirely apart from the question of risk, young people often take pleasure in things that adults tell them are bad. They are constantly told that they should avoid things (like sex or junk food) that they enjoy. At best they tend to disregard such advice—when they do not actually seek out occasions to disobey their elders' counsel. Indeed, the real mystery is how we have managed to convince significant numbers of youths in inner-city school systems— more than 50 percent of whose students drop out of school, despite a massive publicity campaign to the contrary—to avoid taking drugs, since at least in the beginning they would find drug use so enjoyable.

Nevertheless, one kind of drug education does show some promise. Several small-scale experiments have attempted to use peers to teach young students techniques by which they can refuse cigarettes if they want to. They learn, for instance, what to say when others offer them cigarettes or even exert social pressure on them to smoke; this approach has produced significant decreases in the initiation of cigarette use. Such programs are still quite rare, however, and whether we can duplicate them on a large scale with respect to cocaine and heroin, in the neighborhoods that most need them, is by no means clear. At the very least, we need years of research before we can develop programs that can be trusted to do more good than harm.

The charm of education, nonetheless, is seductive. Compared with other means of coping with illegal drugs, it is cheap and seems humane, because it does not require the coercion of our fellow citizens. In this regard, it is similar to bringing pressure upon foreign nations to prevent the production of illegal drugs. Indeed, education may well become the "crop substitution" of the nineties—that is, the supposed panacea for all drug problems.

Conceivably, we will decide simply to continue our present policies. We can spend a great deal on education programs; we can assign the military the task of sealing our borders against drugs; we can seize yachts or fishing boats when passengers or workers have

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abandoned marijuana cigarettes on them; we can legislate capital punishment for drug-related killings (as when drug dealers murder one another). But by adopting such a course of action, we would only be making an emphatic statement that we were taking the drug problem seriously; we would not really be acting seriously. For to act in this manner would in effect be to choose to keep putting up with our problem.

For most middle-class Americans, the use of heroin and cocaine is not a major threat. Heroin never was a threat; and although cocaine was very popular with some wealthy users—the conventional wisdom held that they were heavily overrepresented in advertising, entertainment, and professional sports—and its use significantly harmed the lives of many middle-class youths, much of the damage has already been done. Today, cocaine—especially in the form of "crack"—is increasingly becoming a drug of the lower classes. It is true that all of us suffer from the intimate connection between these drugs and predatory crime, and in more indirect ways from the enormous dislocation and damage done to lower-class neighborhoods by the sale and use of these drugs. Nonetheless, we learned to live with problems like these many years ago. Indeed, it seems that the public gets really excited about the drug problem only when someone from the middle class is killed in a gang shoot-out.

In an ideal world, the best way to reduce the damage done by illegal drugs would be to convince everyone not to use them. In this world, however, we will probably have to reconcile ourselves to using some coercion. On the other hand, once we give up on finding an inexpensive solution, we may take the problem seriously and apply more careful thought and more resources to the job.

Supply-side enforcement

So long as we are unable to suppress the sale of drugs, we will be remitting large parts of our cities to the terrorization of innocent people, drug-related killings, and the brutalization that comes from constant exposure to the use of drugs. Perhaps equally demoralizing is the sight of the large number of teenage drug lords who own Jaguars or Ferraris before they are old enough to have driver's licenses. Nonetheless, we can accomplish much more than we have in the past.

Apart from our efforts in other countries and at the borders, the major thrust of enforcement within the United States has been the attempt to break up large-scale drug rings, arrest small-scale dealers when they sell drugs outside the areas in which drug use is endemic,

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and punish users when they commit other crimes. In recent years local police have stepped up their efforts to restrain street-level selling, and private employers have exerted greater efforts to apprehend their workers' "connection," and to weed out illegal drug users from their work force. The result has been a slow but steady loss of ground for law-enforcement agencies.

One cannot say that careful thought and greatly augmented law-enforcement resources will solve our drug problem. There are large numbers of sellers arranged hierarchically within the United States as part of loose but fairly sizable organizations, taking the drug from its importation into the United States through smaller wholesalers down to the small-scale sellers who provide the drug to users. Unfortunately, we cannot expect to achieve much of a reduction in the number of drug suppliers, even if we jail a sizable percentage of them. The high profits at every level of the drug trade guarantee a huge reservoir of individuals prepared to take the places of those who have been imprisoned. At each level in the distribution scheme there are more than enough competitors; and even at the lowest ranks, those who do minor jobs for the sellers (such as acting as lookouts for the police) seem ready to enter the business.

On the other hand, pressure upon the retailing of heroin and cocaine is not necessarily an unattractive option. In fact, it is probably the major governmental means of restraining drug use in the United States today. The number of locations in which an ordinary middle-class individual can buy heroin and cocaine is not very large. In most of the country, cocaine is not widely available to most people. Heroin is less so. A major task of law-enforcement resources is to increase that area of drug unavailability. At the very least, the police should act immediately to suppress the open-air drug markets that spring up whenever the police are distracted by other duties. In most of our urban areas, greater efforts could drive much of the dealing indoors, where a large percentage of potential customers are afraid to go.

At least for the foreseeable future, it is hard to imagine the police being able to do more than gradually drive the dealing back into the public-housing projects and other relatively small areas in which the police are unable to maintain a presence. Nonetheless, increases in law-enforcement efforts at the retail level may lower the availability of heroin and cocaine to large numbers of people without creating a need to involve ourselves in the most hard-core drug-trafficking areas, in which the police would have to maintain a virtual army of occupation.

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Apart from the difficulty of policing the hard-core drug areas, the most important constraint upon our ability to suppress the sale of drugs is the cost of incarceration space. Our prisons and jails are full, and despite a massive and continuing effort to provide the infrastructure to imprison more and more lawbreakers, the demand threatens to permanently outrun the supply. Drug sales, moreover, are especially difficult and expensive to restrain through imprisonment. The deterrence we expect from the legal threat is in large part neutralized by the high profits at all levels of the drug trade. And incapacitation, the other major restraint provided by imprisonment, is weakened by the fact that the skills necessary to participate in the drug trade are not at all scarce.

Although we must allocate a large percentage of prison space to the incarceration of drug dealers if we are to make headway, there are other methods that can help. At the higher levels of the drug trade, the forfeiture of assets has proven quite successful. We cannot show that the threat has caused any drug dealers to get out of the business, but at the margin it should have that effect; depriving sellers of working capital makes their reentry into the industry more difficult. At the very least, it assuages our sense of justice, as well as providing additional resources with which to further enforcement. It is likely that we can go a great deal lower in the drug-trade hierarchy before forfeiture is no longer worthwhile. It will require a little more ingenuity by the police and cooperation from the agencies of the criminal-justice system before we can strike at the pocketbook of the small-scale seller, but it can be done—and to good effect.

Demand-side enforcement

While pressure on the small-scale sale of drugs represents an attempt to influence drug supply, it also has an impact on drug demand—perhaps a greater one. The buyer who does not reside in an area of heavy drug sales must not only come up with the money to pay for the drugs; he may also have to search longer to make a purchase and worry more about the danger of being robbed or assaulted. He may also be more conspicuous to the police. To some extent, we can take advantage of this problem faced by drug buyers by using a relatively inexpensive means of lessening the number of those who are willing to obtain their supplies from the areas of heavy drug dealing. On a few occasions police have seized the automobiles of those who drove them to purchase drugs. This is not only inexpensive, but also far less brutal than imprisoning otherwise law-

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abiding drug users—and it may have more of an impact. This should be a regular feature of all drug enforcement.

Probably the most important aspect of the attack on drugs is the attempt to lower the amount of predatory crime that drug use engenders. We know, for example, that those who use illegal drugs commit a substantial proportion of our urban burglaries, robberies, and thefts. A number of studies have demonstrated that the criminality rate of those using heroin daily—that is, those who were addicted—was about seven times as great as the criminality rate of the same people when they were using the drug only sporadically or temporarily not using it at all.

Newer studies have shown an even higher correlation between criminality and drug use, and have implicated cocaine as well. Urinalysis of those arrested for crimes in 1986 has revealed that a staggering percentage of those apprehended had recently used cocaine or heroin. In the District of Columbia, 74 percent of non-drug-felony arrestees tested positive for at least one illegal drug other than marijuana. (No one has alleged that marijuana use helps to cause predatory crime, in part because the drug is cheap, in part because it has a tranquilizing effect.) In New York City the figure was 72 percent; in Chicago, 60 percent; and in Los Angeles, 58 percent. It turns out that in large cities about 70 percent of those arrested for robbery, weapons offenses, and larceny tested positive for heroin, cocaine, or (in the few cities where use is common) PCP.

The data on urinalysis suggest an obvious course of action. We must institutionalize routine urinalysis for those arrested for any of the typical crimes arising out of drug use. Then we must act on this information by making maintenance of a urine clean of cocaine, heroin, and PCP a requirement for all those who are released on bail or, after conviction, are placed on probation or released on parole.

A positive urine sample must reliably and immediately mean a return to jail. It is far more important that the enforcement of these rules be consistent than that the jail terms be long. We do not have the jail space that would be needed to provide long terms for this type of offense. And if we try, our efforts will backfire: we will deprive the system of the consistency necessary to get the message through to drug users. But a properly implemented system of imprisonment can make possible a more lasting cure for drug dependency.

This kind of regimen is not without disadvantages. There will inevitably be a dispute over whether we can demand "clean" urine before releasing someone on bail. On the one hand, our jurispru-

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dence tells us that bail is to be used only to guarantee the presence of the accused at judicial proceedings, and there is no firm evidence that drug users are less likely than others to show up in court. On the other hand, more recent precedent seems to allow consideration of the danger to the community if an arrestee is released on bail, and those who use illegal drugs are, on average, much more likely to commit crimes after they have been freed.

Such a system of mandatory urinalysis will also require more money. Parts of the criminal-justice system will simply not give up—even temporarily—the funds they already have and need, even though doing so may help to save money in the long run. The jails are already full, and in many cases under court order not to exceed their present population. Even at two days per failed urinalysis, the increased demand upon those institutions will be substantial. And the maintenance of such a system will require the police to go looking for those who miss urinalysis appointments, a burden that may initially be only partially compensated for by the lower criminality of those now compelled to be drug-free.

Furthermore, the inexpensive urine test, which costs only about $5, but is less than completely accurate, will have to be supplemented by a system in which an arrestee who was confident that he had not used an illegal drug could simply file an affidavit to that effect and be tested by a more expensive but foolproof method (costing about $70). Although there will have to be some sanction for a false affidavit, expensive prosecutions for perjury will not be necessary to deter such conduct (though it is hard to imagine a simpler case to prosecute). The judge, in revoking bail or probation, can simply revoke it for longer.

Then there are the privacy concerns. It should be noted that urinalysis for those who have been arrested involves far fewer restraints on the citizen's right to privacy than the usual attempt to require urinalysis of government employees or members of other large groups, who, as individuals, give us no reason to suspect their drug use. (Nor is it nearly so expensive.) Our statistics on the drug use of those arrested for street crimes already single them out. And apart from the use of urinalysis in the bail decision, there are no real constitutional doubts. If there is a good reason, those arrested for drunken driving, for example, may constitutionally be subjected to blood, urine, or breath analysis, and those released on bail or, after conviction, on probation or parole, forfeit even more of their privacy. They are subject not only to intrusive searches but also to various restrictions on their autonomy. Very few of the restrictions on the

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privacy and autonomy of defendants in the criminal-justice system make as much practical sense as requiring urinalysis in order to monitor their drug use.

The prognosis

What, then, could we expect from the institutionalization of such a regimen? Many of those using drugs will find themselves constantly in and out of jail. Some would simply decide that enough is enough and clean themselves up. We do know that this can occur when the consequences are immediate and certain enough. Nonetheless, in most cases we will have to rely upon drug treatment to prevent the urinalysis system from becoming a huge, inhumane, and expensive revolving-door operation. While it is true that the most reliable and cost-effective drug treatment—methadone maintenance—is helpful only with heroin addicts, there are other therapies that are more cost-effective than permitting the drug abuser to continue untreated; and it is likely that requiring urinalysis will help persuade drug users to undergo treatment.

Indeed, probably the most foolish aspect of our antidrug posture has been the starvation of drug treatment. In many cities there is a months-long wait for those who want to enter a drug-treatment program; this is a serious problem, considering that the desire to reform is often ephemeral, and disappears if it cannot be acted upon at once. Part of the reluctance to invest in drug treatment stems from the moralistic view that it is wrong to spend resources on making life better for criminals; part stems from the (incorrect) belief that treatment does not work. Treatment is difficult; it is frustrating; and it does not always work. But it is cost-effective—and far more so than its only substitute, imprisonment. A necessary component of any serious effort to lower the social costs of illegal drug use, therefore, is a massive increase in funds for drug treatment.

Another fact about drug treatment is also quite important. Although many believe that compulsory treatment is ineffective, this does not appear to be the case. Virtually everyone undergoing drug treatment is in one way or another forced to do so. Indeed, like many alcoholics, who simply want to become social drinkers again and escape the social, psychological, and physical effects of overindulgence, most drug users do not wish to be abstinent, but rather to return to the early days of their more casual drug use. Nonetheless, one of the effects that those dependent on cocaine and heroin may most wish to escape is the pressure of the criminal-justice system. And a criminal-justice system that makes use of urinalysis will

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be more effective in driving them into—and keeping them in—treatment.

The approach I am recommending may have another important effect. For years, the drug-producing nations have argued that the United States must share the blame for the drug problem: if they cannot control the production of illegal drugs, neither can we control our consumption. We may now be able to have some success. Those users who are both criminals and drug consumers appear to be not merely a random selection of drug users; they tend, rather, to be the heaviest users. Thus it is likely that these heavy users consume a disproportionate percentage of the illegal drug supply. This should not be surprising: the heaviest-drinking 10 percent of all drinkers drink well over half the total quantity of alcohol—and our evidence, though less conclusive, points in the same direction with regard to illegal drugs. Indeed, the "J curve" seems to be a constant in human behavior: 15 percent of health-insurance users use 90 percent of the resources; 6 percent of Philadelphia's youths commit over 50 percent of its crimes; and 10 percent of Stanford Law School's students file 90 percent of the petitions to be excused from one requirement or another.

As a result, those users we will be focusing on will be those who do the most to support the illegal market. On average, each seller is supported by three heavy users. If we can bring their use under control—in addition to decreasing the number of predatory crimes—we may finally be able to deal a major blow to the illegal retail-distribution networks. We may also create a sizable cohort of former drug users who can help discourage drug use. If the zeal of the convert in this area is as strong as it seems to be in others—think of ex-smokers, for example—we may reap unanticipated and sizable dividends from our efforts. For decades we have attempted to get at the sellers as a way of preventing use; now we may have the means to get at the users as a means of restraining sales.

I do not mean to suggest that we will be able to solve the problem easily. For the foreseeable future we will have a serious drug problem, but we can lessen it considerably if we have the will. Where will the money necessary to accomplish this come from? The additional resources we need for law enforcement and drug treatment will come from the federal government, or they will not come at all. Whether the resources will come is simply a question of whether we have finally begun to take our drug problem seriously. It will be interesting to find out.

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Can the borders be sealed?

PETER REUTER

THE RHETORIC of drug policy has changed in the last five years. Political figures, from the head of the Drug Enforcement Administration to local police chiefs, have agreed that enforcement of drug prohibitions has clear limits in its ability to reduce drug use. The call now is for so-called "demand-side" measures, particularly prevention programs. Nonetheless, America continues to commit its resources, if not its spirit, almost entirely to enforcement. In the 1988 fiscal year, 75 percent of the federal "drug-war" budget was devoted to enforcement; total expenditures reached almost $4 billion. The Senate passed an odd contingency bill (by a resounding ninety-three to zero), allowing the President to spend an additional $2.6 billion on drug programs in Fiscal Year 1989, if he determines that drugs constitute a "national emergency."[1] Of this $2.6 billion, most would go to enforcement, with particular emphasis on acquiring sophisticated equipment for interdiction.

This article is drawn from Peter Reuter, Gordon Crawford, and Jonathan Cave, Sealing the Borders (*Santa Monica, CA: The RAND Corporation, 1988*).

[1] The contingency aspect arose from the fact that the bill would have broken the budget ceiling agreed to by Congress and the President. The House did not approve of this ruse, and rejected it by a 412-0 vote. At present it is not clear how the extra money will be found, but there is little doubt that total federal drug expenditures will rise.

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This preference for enforcement is not just a federal passion. Expenditures on police enforcement at the state and local levels have been estimated at $4.4 billion in 1986, the latest year for which an estimate is available. Prosecutors, courts, and prisons may have added another billion or two to that figure. State and local government expenditures on drug prevention and treatment in that same year were only about $800 million. It is likely that the disproportion has increased since 1986, given public pressure on law-enforcement agencies to intensify their efforts against the visible and violent street markets that characterize so many large cities.

Federal enforcement expenditures go to a variety of programs, ranging from support for more sophisticated prosecutions by state and local agencies to source-country control programs. But the largest single program is for interdiction—that is, the effort to seize drugs and couriers on their way from the source countries (principally Colombia and Mexico) to the United States. In the 1988 fiscal year, interdiction accounted for about $1.04 billion in federal expenditures, and Congress has been baying for more.

Congress has been particularly eager to have the military shoulder more of the growing interdiction burden; it reasons that the military's $300 billion annual budget and its enormous arsenal of apparently relevant equipment—from helicopters to sophisticated radar devices to fast ships—should enable it to dramatically reduce the capacity of smugglers to bring drugs across U.S. borders. In late 1986 the House of Representatives passed an amendment that would have required the military services to become the primary interdiction agencies, and to "seal the borders" within forty-five days of passage of the act. The Senate, after a scathing attack on the proposal by Senator Sam Nunn (who argued that it was "the equivalent of passing a law saying the President shall, by Thanksgiving, devise a cure for the common cold") rejected the amendment, but the 1986 Omnibus Drug Control Act did require the military to become much more active in the interdiction effort. Some members still support the view that the military should take on this task. Senator DeConcini, one of the leading drug warriors, has even broached the prospect of using SDI if all else fails in this struggle. In May 1988 the House passed another bill putting more of the burden on the military; ironically, the House proposed shifting $475 million from SDI development to antidrug efforts.

Yet the recent results of cocaine-interdiction efforts are certainly not encouraging. It is true that as interdiction expenditures have grown (since 1981), the amount of cocaine seized has also grown

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dramatically: whereas in 1981 interdictors seized 1.7 tons of cocaine, the total may have been as high as forty tons in 1987. Furthermore, even though total cocaine imports increased rapidly over that same period, a much larger share of shipments to the U.S. was seized in 1987 than in 1981. (The interdiction seizure rate in 1987 may have been as high as one quarter.) Nonetheless, not only did total imports apparently increase, but the price of cocaine, at both the import and retail levels, also fell rapidly. By late 1987 it was asserted that some large shipments of cocaine were selling for only $15,000 a kilogram in Miami (compared with about $55,000 a kilogram in 1981). At the retail level, where the kilogram is broken down into one-gram units, the price per kilo fell from about $600,000 to $250,000.

The recent past suggests that interdiction, even if it produces a high rate of seizures, will do little to decrease cocaine imports. The Congress, backed by numerous General Accounting Office reports, seems to believe that the problem lies in the execution of the interdiction program—in particular, lack of coordination. There have been public squabbles among the agencies over who has primacy, as well as complaints about a lack of trained personnel and underfunding of operation and maintenance budgets. All this has fed Congress's suspicion that more could be accomplished with the resources currently allocated.

What in fact could an improved and expanded interdiction program do to reduce cocaine consumption in the United States? This is a question that Congress rarely asks. It has occasionally asked the interdiction agencies (notably the Coast Guard and the Customs Services) what they believe is required to "cut off" the flow of drugs. Since both agencies are too sensible to have any faith that they could actually accomplish that, they have answered in appropriately vague ways. The Customs Commissioner has described a program that would require a twenty-five-mile cordon around the United States, with every entering vessel, plane, or vehicle having to submit to inspection before crossing the cordon. Commissioner van Raab correctly assumes that this is not a realistic prospect, and little time has been spent on fleshing out the proposal.

The more serious question is what might be achieved through large increases in the interdiction program, whether invested in military or non-military resources. A recently published RAND study carried out on behalf of the Department of Defense argues that it is extremely difficult to reduce cocaine consumption in this country by even as little as 5 percent through a more stringent inter-

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diction program.[2] The problem lies in the adaptability of smugglers, the variety of methods by which cocaine can be brought into the United States, and the low price of both drugs and labor for smugglers.

Adapting to changing strategies

We know relatively little about the organization of the smuggling business. Those who get caught by interdictors are generally lower-level agents, pilots (who may be highly paid), crewmen on ships, and unloaders. Those who run the smuggling organizations remain fairly shadowy figures, probably residents of the source countries themselves. We cannot say if they are, as press accounts often suggest, peculiarly astute businessmen. They have shown at least a modicum of shrewdness in their adaptation to changes in the strategies of interdictors, however. When, in the early 1980s, the Customs Services improved their radar surveillance of the South Florida Coast—then the primary entry point for both cocaine and marijuana—smugglers changed their methods.

In the case of marijuana, as the Coast Guard increased its efforts against sea-borne traffic into southern Florida, the smugglers shifted to smaller loads. Whereas the average seizure in 1978 was 9 tons, by 1986 it had fallen to 4.6 tons. "Mother ships," carrying fifty to a hundred tons and offloading to smaller, faster boats for the final run to the Florida coast, almost disappeared during this period. The result was an enormous dilution of the efficacy of maritime interdiction. It takes the same resources to interdict a five-ton shipment as to interdict a twenty-ton shipment, particularly since the Coast Guard vessels must generally tow the smuggler back to shore to begin legal proceedings; an arrested person cannot be held for long without the beginnings of formal prosecution. Thus by halving the size of the average shipment, the smugglers practically doubled the task confronting interdiction agencies. Indeed, since smugglers were then able to use smaller boats, the interdictors had to sort through a larger number of potential smuggling vessels.

Similarly, cocaine smugglers shifted much of their traffic to other routes. In particular, there seems to have been a substantial

[2] Senator DeConcini has questioned the objectivity of this study, in view of the fact that the military has made no bones about its lack of enthusiasm for drug interdiction. As the leader of the RAND project, I can say that no Defense Department official sought to promote a particular conclusion, and that the Department reviewed the report only for factual accuracy; substantive comments came mainly from the interdiction agencies themselves. The report may turn out to be incorrect, but it was certainly objective; it derived from research that was entirely free from sponsor influence.

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increase in the amount of cocaine brought in through Mexico. Once in Mexico—and there are few barriers to entry from the south of that country (with or without General Noriega's assistance)—the drugs may be brought across by small plane, private vehicle, or even by boat.

The peculiar problem presented by Mexico is that planes taking off from there may be at risk for only short periods of time. There are numerous landing strips less than thirty miles south of the U.S. border. A small plane can make the trip over the border and drop its load (if need be, without landing) in less than an hour. During this period the U.S. interdictors must not only "see" the plane, but also identify it as a vessel used by smugglers and launch interceptors to catch it. This is not technically impossible, but it is exceedingly difficult. It is particularly difficult when there is no continuous radar coverage along the Mexican border, which has been the case until quite recently.

The number of methods that have been used for bringing in large shipments of cocaine is impressive. Air-cargo bays have been found stuffed with the drug. The U.S. rose-growers' association once tried to bring an action against its Colombian competitors for illegal subsidies in violation of GATT (the General Agreement on Tariffs and Trade), arguing that the cocaine smugglers were subsidizing the shipment of roses for purposes of concealment. The International Trade Commission correctly pointed out that any such subsidy was a private one, hence beyond the reach of the GATT rules.

Other large seizures have involved furniture or other objects stuffed with cocaine, carried in cargo ships, or concealed in trucks, coming over the Mexican border. One ton of cocaine was recently found hidden in a cargo of frozen fruit pulp arriving from Ecuador. Four tons were found in a cargo of Brazilian lumber, following a tip from a Colombian source. Though there are still occasional seizures of modest quantities of cocaine hidden on the persons of airline passengers, the declining cost of the drug is causing smugglers to move toward less labor-intensive smuggling methods. There have been no reports of smuggling over the border in model planes or Remote Pilotless Vehicles, but these are clearly possibilities if the risks associated with other methods increase.

Smugglers have continued to change their methods for bringing cocaine into this country. In 1985, for example, the Coast Guard began seizing significant amounts of cocaine on private boats. Whereas in 1981 the first 100-kilogram seizure attracted considerable attention, the average seizure by the Customs Air Branch in

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1986 was 250 kilograms. Even thousand-kilogram seizures barely rate a front-page reference now. Mere expansion of the total size of the cocaine market could not account for this order-of-magnitude increase in the size of shipments. That change reflects some important developments in the cocaine market.

The costs of smuggling

Interdiction affects the consumption of cocaine in the U.S. by affecting its price. No one seriously claims now that interdiction can control the amount of drugs physically able to reach this nation. There are simply too many experienced smugglers, and too many producers and refiners, for that to be feasible. Interdiction might be able to make smuggling costs so high that U.S. consumers would want less (so that less would be delivered); but interdiction could not be so effective that, say, only a hundred tons of cocaine would reach our shores. Thus we need to look at how interdiction raises smugglers' costs and, eventually, the price of cocaine for users.

Smuggling entails four primary costs: drugs, personnel, transportation, and corruption. Not only is each cost currently modest (compared with the retail price of cocaine), but it is hard to see how any of them could be made significantly higher.

Producing drugs is inexpensive. The leaf that goes into making a kilogram of cocaine costs about $1,000; not much more goes into the refining process. Fully 99 percent of the price of the drug when sold on the streets in the United States is accounted for by payments to people who distribute it.

Seizing drugs close to the source thus imposes little penalty on the drug-distribution system. Drugs are cheaply replaced. A kilo seized on the beaches of Colombia in 1987 probably cost less than $5,000 to replace, including the cost of getting it from the refinery to the point of export. Even by the time it made it out of Colombia into Mexico or the Bahamas, it probably cost less than $15,000. These figures are substantially lower than those of 1981.

As a result it seems likely that smugglers will now spend less to protect their drugs. Precautions are expensive. A smuggler whose cocaine costs $10,000 per kilo will spend more to protect it (for example, by bribing the local sheriff) than a smuggler whose replacement cost is only $5,000 per kilo. With lower replacement costs, the smuggler may also find it sensible to send larger shipments in a single load. The transportation costs are the same for a 200-kilo shipment in a private plane as for a 100-kilo shipment. The pilot's risk of

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long-term imprisonment is also the same. A smuggler who wants to get across two hundred kilograms a month will be more likely to do it in one rather than two shipments when the price of cocaine falls.

Simple arithmetic demonstrates how little the seizure of the drug itself can affect the retail price of cocaine. Assume for the moment that instead of seizing 20 percent of all cocaine shipped from Colombia, the interdiction agencies were able to seize 50 percent. The present retail price is (approximately) $250,000, which includes compensation for lost drugs. If an additional 30 percent of drugs were seized, the kilo sold in the street would incur an additional $6,000 in replacement costs (assuming that a kilo costs as much as $20,000 to replace). Thus our succesful drug-seizure program would have added less than 3 percent to the retail price of cocaine.

An analysis of labor costs is even more discouraging. The problem is simply that smugglers of cocaine need very little skilled labor per kilogram. Even if their workers demand high compensation for the risks of long prison terms, it will have little effect on the final price of the drug.

Consider the pilot who flies in 250-kilogram shipments over the Mexican border. A fair guess is that he now receives about $250,000 for incurring the risks of the business—attempting to land under difficult conditions, and possibly going to prison. Assume that we have much more effective interdiction—that is, that the pilot is more likely to be caught, and that he faces a much longer prison term if caught. The pilot then triples his demands, and will now make the trip only if paid $750,000, surely a fair down payment on his daydreams of wealth. Unfortunately, this adds only $2,000 to the per-kilogram cost of bringing cocaine into the U.S., less than 1 percent of the retail price.

The tale is at least as depressing when we consider the other types of labor used by smugglers. Pilots presumably value their freedom rather highly; they have, after all, prospects of reasonable earnings in legitimate positions. The same cannot be said for crewmen on ships coming up from Colombia. Their earnings from other employment may be quite modest, and the rigors of a U.S. federal prison may not appear too daunting when compared with life on a Colombian fishing vessel. They already face at least a one-in-nine chance of being arrested on any marijuana smuggling trip, and the federal judiciary is not lenient in these matters; in South Florida the average 1986 sentence was forty-six months for those caught by the Coast Guard. Nonetheless, crew members are believed (a stronger statement is unfortunately not possible) to earn only about $15,000

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each for taking the trip; the master may get as much as $25,000. Total crew costs are probably between $100,000 and $150,000. Even if better interdiction were to double this cost, it still would add little to the cost of bringing in a kilo of cocaine, assuming that smugglers are willing to put aboard a hundred kilograms at a time.

The reader need not be burdened with details concerning transportation. Adequate vessels and planes are available for $100,000; defrayed over a 250-kilogram shipment, that amounts to only $400 per kilogram. Seizing equipment has no more promise than seizing drugs or couriers.

The risks of smuggling

Given these facts, it should come as no surprise to learn that an effort to simulate the effect of increasingly effective interdiction (through a formal mathematical model) found that improved interdiction will have little impact on U.S. cocaine consumption. In the model, interdictors seized increasing quantities of cocaine, even increasing shares of total shipments, but were able to reduce total consumption by more than 5 percent only when they could raise the risks for almost every mode of bringing in the drug. And there lies the rub; it is hard to see how all the many and disparate methods of bringing in this compact drug could be made very risky.

We built a model in which smugglers had to make a choice among different routes for bringing in cocaine. Each route was associated with a particular risk, and with particular transportation/personnel costs. As the interdictors raised risks along a particular route, the smugglers were induced to shift away from that route and to send more of their shipments along alternative routes. Increasing the probability of interdiction raises the smuggler's costs, since he must now face higher drug-replacement, transportation, and labor costs. With little hard data available, assumptions were made that favored the interdictors. For example, we assumed that labor costs were quite sensitive to risk, so that raising the risk of being caught from 0.25 to 0.50 led to a quadrupling of a pilot's payment.

Even with these favorable assumptions, it proved very difficult to raise smugglers' costs enough to greatly increase the retail price of cocaine, and thus reduce total consumption. In the model, smugglers had eleven routes available to them—five by air, five by sea, and one by land. (The land route represents shipment across Mexico.) The interdictors were assumed to be able to raise risks on all of

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the routes except the land route, in which the drug is, in effect, walked across the border in small shipments. The probability of a shipment's being intercepted on the land route stayed fixed at 10 percent, but other costs (particularly personnel) were assumed to be relatively high.

When we raised the risk of capture along one route from about one-quarter to one-half, smugglers negated this by shifting to other routes; their costs rose by less than 2 percent, or about $117 per kilo. It was only when five out of eleven routes were subject to the higher risk that imports fell by more than 10 percent. When the risk was raised on all ten of the non-land routes, smugglers' costs per kilo rose by $7,663, or about 3 percent of the retail price. Consumption now fell by more than 20 percent. As more routes incurred the higher risk, an increasing share of total shipments were imported via the Mexican land border.

The unintended consequences of drug policy

The astute reader will now have identified a puzzle. Depressing though the above analysis may be, it still suggests that more interdiction, even when smugglers adapt, will raise prices. Yet more intense interdiction since 1981 has been accompanied by declining prices, contrary both to intuition and to the foregoing projections. The explanation may lie in the phenomenon of "learning by doing": most individuals and organizations get better at their job the longer they do it. This is the basis for the famous strategy suggested by the Boston Consulting Group in the early 1970s: "investing in the learning curve."

Our conjecture—and it is no more than that—is that the rapid growth of the cocaine market has increased the number of experienced smugglers, and that this has driven down the cost of bringing cocaine into the United States. Experienced smugglers can control their risks better than novices: they know more about the risks of particular methods of importing, have better connections with corrupt officials, and can obtain better credit from their suppliers. Prior to 1980, there were relatively few experienced smugglers, and they could not, without raising their risks a great deal, provide enough cocaine for the entire market. Thus the price of cocaine smuggling was determined by the marginal smuggler, a novice trying to become an expert.

Novices, if they are not caught, eventually become experienced. Interdiction is obviously more successful with novices than with ex-

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perienced smugglers, because the latter are better at avoiding interdictors. But enough novices make it through, at least when the market is expanding rapidly, that the stock of experience may grow relative to the size of the market. With enough experienced smugglers in the business, they can supply the entire market, and the price for smuggling services will fall. This seems to be a plausible account of why the cocaine import price has tumbled by as much as two-thirds since 1981.

But if this account is correct, we must then accept some possibly nasty consequences of intensified interdiction. Experienced smugglers can benefit from interdiction, since it catches the potential competition; their profits will rise without a corresponding increase in risk. If there is a cartel of experienced smugglers, with an interest in trying to set prices for cocaine smuggling, then its prospects may certainly be enhanced by intense interdiction, the disproportionate weight of which falls on the newcomers. The recent four-ton seizure mentioned above was generated by a tip from Colombia, though the shipment came from Brazil; perhaps the cartel is attempting to gain control of the market by helping interdictors.

Another irony that emerges from systematic analysis of the interdiction program concerns the source countries. Interdiction can impose costs on smugglers in a variety of ways. But inasmuch as it involves the seizure of drugs, interdiction will increase the earnings of source-country producers, thus exacerbating the problems with which the U.S. government is urging the source-country governments to deal.

The explanation for this conundrum lies in the fact that source-country earnings come from all drug shipments, not just from those drugs that are actually consumed. Some of these shipments reach users. Others are seized. Total demand for producers equals the sum of shipments that are seized and those that reach their destinations. As more is seized, total export demand goes up. Of course, higher seizures will raise smuggler costs and thus reduce demand, but it is possible to show that only under highly improbable conditions will the price increase reduce demand by more than enough to compensate for the increase in demand caused by the seizure itself.

It is not inevitable that more successful interdiction leads to an increase in export demand. If interdiction can make smugglers take more precautions and raise their non-drug costs (personnel, transportation, or corruption payments), then it will reduce total shipments. It is difficult to determine whether such a goal can be achieved in practice, however.

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The Mexican border

Clearly the porousness of the Mexican border is an important part of the problem. It has become the principal gateway for all three of the major imported drugs: cocaine, heroin, and marijuana. Yet among the source countries, Mexico is the only one that seems not to have developed its own significant drug problem (in that domestic drug consumption has not increased there); hence it is the one source country in which pressure might actually have some impact.[3]

In trying to persuade the other major source countries (Bolivia, Colombia, and Peru) to make a serious effort to curtail drug exports, the U.S. government is usually handicapped by two factors. First, the earnings from drug production are an important source of income for large peasant populations, and generate a significant share of the nation's export earnings. Second, the source-country government either has weak political control of some of the growing areas (Bolivia and Peru) or is facing an opponent that has the capacity to threaten the lives of government leaders (Colombia). The first condition creates ambivalence, the second incapacity.

Neither of these conditions applies to Mexico. Drug earnings are not a significant share of total export income or even of the regional income in the areas in which drugs are produced. The Mexican government does not incur any major political threats by cracking down on the drug trade. In fact, the government has been reasonably active, and the Mexican Attorney General has pointed, with considerable ire, to the large number of Mexican policemen (154) that have died in drug-enforcement efforts, undertaken largely for U.S. interests. Indeed, it is likely that more Mexican than U.S. police have died while attempting to enforce U.S. drug policies.

Clearly, it would be naive to expect that Mexico could eliminate either drug production or transshipment; after all, the U.S. domestically produces an increasing share of its own marijuana (perhaps as much as one-third), despite highly publicized and well-funded efforts at eradication. Transshipment is of course even harder to stop; the U.S. does not manage to capture a large share of the drugs that move within its domestic commerce, either. But it is not unreasonable to expect Mexico to cooperate with the U.S. in cross-border control—to allow "hot pursuit" of smugglers, for example.

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[3] For an analysis of the obstacles to effective control of source-country exports, see my "Eternal Hope: America's Quest for Narcotics Control," *The Public Interest*, No. 79 (Spring 1985).

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Mexico has chosen not to do so. U.S. planes must turn back at the border, and cannot receive coordinated support from Mexicans in pursuing those planes further. The explanation for this seems to lie less in corruption, to which U.S. politicians often point, than in the sensitivity of Mexico about its political autonomy. History provides some basis for that sensitivity, which has probably been heightened by recent finger pointing. Getting cooperation from the Mexicans on border control is one way of making progress on the interdiction front (though I remain skeptical that it will make a major difference for the long-term availability of cocaine or heroin, given their compactness).

The role of the military

The temptation to reach for the military is understandable. The armed forces have vast quantities of equipment designed to ensure that we can see our enemy, rapidly close in on him once he has been seen, and attack him if he does not agree to follow our orders. Surely the armed services must be able to do this against drug smugglers, still not a very high-technology foe, if they are to be competent against the nation's better-armed strategic adversaries.

The problem is that smugglers have a different set of goals from those of America's other adversaries, and that drug-interdiction efforts require acceptance of certain constraints that do not apply in wartime. Smugglers do not seek to cross the border in large numbers in a short period of time; they seek instead to enter in a steady flow, disperse once they are over the border, and never reassemble. More importantly, this nation is not willing to impose the strict entry requirements that are almost automatic during wartime. We still wish to allow regular commerce and tourism. Long delays at the Mexican border for commercial traffic, such as those that resulted from Operations Intercept and Alliance, are regarded as intolerable for any length of time. Pleasure-craft owners, as formidable a middle-class lobby as the private-pilots' association, are not going to agree to increased restrictions on their activities for the sake of catching a few extra drug smugglers.

Thus the heart of the problem—especially after adopting more stringent interdiction measures—is distinguishing smuggler from innocent. Data from the Coast Guard, which has sole jurisdiction outside U.S. territorial waters (sometimes using Navy equipment), point to the problem. Even when the Coast Guard has prior information that a vessel may be carrying drugs, only one out of eight of

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those boarded is found to have drugs. This figure is about five times higher than the agency's success rate when it has no prior information, but it nevertheless points to the difficulty of recognizing smugglers.

The military can ensure that the Coast Guard will see more vessels and pursue more of them for the purpose of boarding, but it cannot do much to help the maritime services distinguish the indistinguishable. Smugglers do not need distinctive equipment, and can readily blend in with other traffic. As a result, the book of hull types issued to Coast Guard commanders is a thick one; the thicker the book, in this case, the less information it imparts.

Maritime interdiction has been oriented primarily toward catching marijuana smugglers, and has certainly made smuggling from the Atlantic coast of Colombia a fairly risky business. But an increasing amount of cocaine now seems to move by sea as well, and represents a much more difficult target than marijuana. A 100-kilogram shipment of cocaine is much harder to detect, once the boat is boarded, than a five-ton cargo of marijuana. Thus even if the military does increase the number of ships seen, halted, and searched, it is likely that the cost of smuggling cocaine by sea will remain modest.

The military problem here, unfortunately, is similar to that faced by the U.S. when it attempted interdiction of North Vietnamese supplies heading into South Vietnam. It is the simplicity of the enemy's needs and technology that makes interdiction difficult; there are no large, fixed targets whose destruction makes a difference. Smuggling organizations are also capable of the decentralization, adaptability, and capacity to camouflage themselves in the civilian traffic and population that made the Viet Cong such an elusive target.

The politics of interdiction

However original the foregoing analysis, its conclusions are familiar: greater efforts at interdiction are not going to have much of an effect on the nation's cocaine problem. A similar argument can be made with regard to much of the federal enforcement effort.

Given the general lack of faith in the effectiveness of enforcement, why does it still attract so much support? Clearly no member of Congress wishes to be on record as being "soft" on drugs. A vote against a proposed increase in drug enforcement incurs the risk of such an accusation. Budgetary limits, in theory, force any increase in the drug budget to be weighed against some other (presumably desirable) program. In fact, as was shown in the recent contingency

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bill passed by the Senate, it is possible to get around these trade-offs by labeling the drug problem a crisis.

Those politicians who are more thoughtful about the problem, and see beyond the rhetoric of the drug warriors, face further obstacles if they wish to achieve visible results in the short run. Maybe prevention is the principal long-run hope, but does that necessarily mean that the nation should immediately spend large sums on prevention efforts? Precisely because prevention has been slighted in the past, we have no well-developed models of what works. We know a good deal about what does not work—programs that aim to scare adolescents, for example, or simply telling them about the pharmacology of drugs—and we know, from smoking-prevention programs, something about the design of what does work. But moving from principles of design to working programs, particularly for schools in inner cities, is a long step. A lot of research is necessary before good prevention programs are readily available.

Given these facts, it is scarcely surprising that Congress continues to push enforcement programs on an administration that is visibly wearying of the fight it entered with so much enthusiasm. Interdiction does produce visible results: drugs seized, assets confiscated, smugglers imprisoned. Spending more will almost certainly produce more of each of these desirable outputs. What effect this has on the drug problem is almost secondary—or at least Congress acts as if it were; for Congress never seems to raise the issue, either with the interdiction agencies or with its own watchdog, the General Accounting Office.

What is largely neglected by both branches of the federal government is the less glamorous set of programs that make up the drug-treatment sector. There is not much of a constituency for these programs, which are often staffed by ex-drug offenders, and which offer services primarily to underclass drug users. Few of the programs' clients seem to be cured of their drug problem, and many have long histories of arrests and continued drug use while in the programs.

Public treatment programs have been systematically starved of funds since 1981; their share of the federal drug budget has shrunk from about 19 percent in 1981 to 14 percent in 1988. Yet intensified enforcement and the more addictive nature of crack have greatly increased the demand for their services. There are long waiting lists for treatment in most major cities. Creating better treatment programs, which can handle the variegated populations now at their doors, should be an important goal.

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This is not to say that the interdiction program should be abandoned. The standard estimate of the economic cost of drug abuse in this country is somewhere between $50 billion and $100 billion—and that does not include a number of social costs, such as the fear of crime, that might add substantially to the figure. If the billion-dollar interdiction program reduces that cost by a few percentage points, society might judge it as money reasonably spent.

The real issue is whether we would obtain a greater reduction in the social costs of drug abuse if some of that money were allocated to other programs. I know of no analysis that would provide a firm answer to that question, but my own suspicion is that the nation would be better off putting more money into treatment and less into interdiction. A few more resources put into research, so that we can base policy choices on something firmer than instinct and image, also sounds like a reasonable expenditure.

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What's wrong with private prisons

JOHN J. DiIULIO, JR.

THIS YEAR Americans will spend an estimated $20 billion on convicted criminals. State corrections budgets have been soaring. In California, for example, corrections expenditures have been increasing at an average annual rate of 21 percent (vs. 8.5 percent for education and 4.5 percent for health and welfare). New Jersey appears to be headed for a corrections budget of $2.5 billion in the year 2000. Adjusted for inflation, this is more than all states combined spent on corrections in 1975, and more than New Jersey is projected to spend in the year 2000 on higher education—or any other program except primary and secondary education and Medicaid.

Today about 3.3 million Americans—roughly one white male in thirty-five, and one black male in nine—are living under some form of correctional supervision. About three-quarters of them are in their communities on probation or parole; the rest are behind bars in prisons or jails. Unless there is a radical and unexpected change in both demographic trends and sentencing routines, by the year 2000 the number of citizens in the charge of corrections officials will easily exceed 4 million. The California Department of Corrections and the Federal Bureau of Prisons alone will hold some 200,000 prisoners. And corrections will represent the largest single item in many state budgets.

In virtually every area of corrections we have been spending more and doing worse. Many of the nation's nearly 5,000 prisons

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and jails are crowded, filthy, violent, and unproductive. In dozens of jurisdictions, all or part of the correctional system is under judicial orders to change and improve. Conventional probation and parole programs are failing. For many classes of offenders, recidivism rates are creeping upward.

Practitioners, activists, policymakers, and scholars have been searching for ways to relieve America's ailing correctional system. In the 1960s and early 1970s, one popular answer was to stop building secure institutions and to deinstitutionalize offenders—to "tear down the walls." In the 1980s, amid the ongoing search for meaningful alternatives to incarceration, proposals have been made to give the private sector a significant role in the administration, financing, and construction of correctional facilities and programs —to "sell the walls." The former answer proved bankrupt; what should we expect from the latter?

The extent of private corrections

Three states have enacted laws authorizing privately operated state correctional facilities, while more than a dozen others are actively considering the option. In 1985, Corrections Corporation of America (CCA), a leader among the twenty-odd firms that have entered the "prison market," made a bid to take over the entire Tennessee prison system. Though this bid was unsuccessful, CCA now operates several correctional facilities, among them a Federal Bureau of Prisons halfway house, two Immigration and Naturalization Service facilities for the detention of illegal aliens, and a 370-bed maximum-security jail in Bay County, Florida. On January 6, 1986, U.S. Corrections Corporation opened the nation's first private state prison, a 300-bed minimum-security facility in Marion, Kentucky, for inmates who are within three years of qualifying for parole. In addition, over three dozen states now contract with private firms for at least one correctional service or program—in most cases medical and mental-health services, community treatment centers, construction, remedial education, drug treatment, college courses, staff training, vocational training, and counseling.

The paramount question in the debate over the privatization of corrections is not whether private firms can succeed where public agencies have ostensibly faltered, but whether the privatization movement can last. Some observers believe that the movement, though barely eight years old, is already running out of steam. They point to the failure of CCA to win control of the Tennessee system, Pennsylvania's statutory moratorium on private-prison initiatives,

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the rushed campaign by CCA and other firms to establish themselves in foreign markets (mainly Britain and France), and the fact that private-prison operations have not advanced much beyond the proposal stage in most jurisdictions (and are not even on the drawing board where public-employee unions are strong—that is, outside the South).

Other observers, myself included, see privatization as a response to three main conditions: soaring inmate populations and caseloads; escalating costs; and the widespread perception that public-corrections bureaucracies have failed to handle convicted criminals in ways that achieve public protection, deterrence, just punishment, and the rehabilitation of criminals in a humane and cost-effective manner. As each of these conditions intensifies, so too will private-corrections initiatives.

At least three sets of issues are raised by the privatization of corrections. First, can private corrections firms outperform public corrections agencies? Can they produce and deliver more and better for less? Second, should the authority to administer criminal-justice programs and facilities, to deprive citizens of their liberty, and to coerce (even kill) them, be delegated to contractually deputized private individuals and groups, or ought it to remain wholly within the hands of duly constituted public officials? Third, does privatization present a single "either-or" bundle of policy alternatives, or does it pose multiple choices?

The cost of private prisons

At this stage it is impossible to answer most of the empirical questions about the comparative cost-effectiveness and efficiency of private correctional operations. Though publications on the subject now number in the hundreds, the necessary research has simply not been done, and relevant empirical data remain scarce. Theoretical speculation, anecdotes, and raw statistics abound, but there is as yet little dependable information to tell us whether or how privatization can work, and at what human and financial cost.

Of course, this lack of policy-relevant knowledge has not prevented a shower of assertions on both sides of the debate. Proponents of privatization claim that it can shave anywhere from 10 to 25 percent from the nation's correctional budget. In support of this contention, they invoke several stock arguments in favor of privatization. Unlike government bureaucracies, advocates argue, private firms are freed, to a degree, from politics, bureaucracy, and costly union contracts. Private companies must answer to their investors

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and satisfy the terms of their contract with the government or risk losing it. As in any open market, the firms must compete with each other to maximize services while minimizing costs, or else they will go out of business. While government agencies enjoy a virtual monopoly and need not strive to improve the quality and quantity of services, it is argued, private firms will have every incentive to economize and will be held accountable at every turn.

Some proponents add that privatization engenders a legislative climate more receptive to the production and sale of prison-made goods. Operators of private facilities, it is claimed, have incentives to produce and sell inmate-made goods, and might help to persuade lawmakers to authorize prison industry as an effective cost-saving measure, and thus to join in efforts to transform prisons and jails into "factories with fences."

Opponents of privatization claim that major cost cutting can be achieved only at the expense of humane treatment. Private firms, it is reasoned, have no incentive to reduce crowding (since they may be paid on a per-prisoner basis) or to foster less expensive (and to the private firm, less lucrative) alternatives to incarceration. Indeed, critics charge, since prisons have traditionally been financed through tax-exempt general-obligation bonds, privatization encourages costly prison construction. Elected officials can pay for construction through lease agreements that fall within government's regular appropriation process, thereby avoiding the political headaches involved in raising debt ceilings or gaining voters' approval of bond issues. The firms' staffs, it is predicted, will be correctional versions of "rent-a-cops"—ill-trained, undereducated, poorly paid, and unprofessional.

In theory, concerns about staffing, compliance with professional standards, use of force (lethal and nonlethal), strikes, fiscal accountability, and the like can be addressed through tightly drawn contracts. But opponents assert that in practice, either government regulation will prove inadequate or the costs of effective regulation will more than consume any savings from privatization. Critics also argue that privatization can neither minimize the liability of governmental units under federal civil-rights laws (under which most "conditions of confinement" litigation has been brought) nor relieve the government of its constitutional duty to administer the criminal-justice system.

In this cross fire of empirically ungrounded claims about private corrections, only one argument has been mortally wounded by the existing evidence—namely, that government can construct prisons and

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jails as quickly and as cheaply as private firms. Over the last few years, the advantages of private construction arrangements have become so clear in so many cases that not even the most inveterate opponents of private involvement in corrections can deny them. In California, for instance, one of the most ambitious prison-building projects in history was stalled until complete responsibility was transferred to a private, Arizona-based construction-management firm.

The morality of private prisons

Discussions of the morality of private corrections are almost as impoverished as the empirical literature on the subject. Two mistakes are often made. First, there is the substitution of empirical for normative criteria, giving rise to the notion that if it could be shown beyond a reasonable doubt that private involvement improves (or worsens) correctional services, lowers (or increases) correctional costs, and exceeds (or falls below) constitutional requirements, then the normative questions would thereby be resolved. While some academics commit this mistake, it is made more often by correctional policymakers and practitioners. For example, in *A Handbook for Decisionmakers*, which is distributed by the nation's leading association of corrections professionals, it is tacitly assumed that while "government has the ultimate authority for corrections," the moral standing of private management is wholly unproblematical as long as it conforms to "professional standards" and contributes in tangible ways to the "effectiveness and efficiency" of correctional operations.[1]

The second mistake in discussions of the morality of private corrections is made less often by policymakers and practitioners than by academics who focus on the profit motive of the privatizers. They assume that the central moral problem of private corrections is not whether the authority to administer justice ought to be delegated by contract to private, nongovernmental parties, but whether the private contractors ought to be paid or to profit financially for their services. In effect, they worry less about whether the government's responsibility to govern ends at the prison gates than whether (and how much) the gatekeepers get paid.[2]

[1] Charlotte A. Nesbitt, ed., *Public Policy for Corrections: A Handbook for Decisionmakers* (College Park, MD: American Correctional Association, 1986), pp. 50-53. It should be noted, however, that this manual contains much worthwhile information about some facets of privatization and assorted other topics.

[2] See, for example, Michael Walzer, "Hold the Justice," *The New Republic*, April 8, 1985, pp. 10-12. The preoccupation with profits can be found in less learned (and less disinterested) sources as well; see for example, American Federation of State, County, and Municipal Employees (AFSCME), *Does Crime Pay?: An Examination of Prisons for Profit* (Washington, D.C.: AFSCME, 1985).

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The question of whether it is ever right to profit from the misfortunes of criminals and their victims is a serious one. But it must be understood that there have been, and continue to be, several nonprofit, nonpublic corrections enterprises (for example, Florida's Okeechobee School for Boys, run by the Eckerd Foundation). A properly constructed moral case for (or against) private involvement cannot turn simply, or even mainly, on whether the private contractor reaps huge or moderate profits—or none at all. By analogy, if one reasons that it is morally wrong (or right) for married men to have sex with women other than their wives, then it matters little (if at all) whether the act is done with high-priced call girls, cheap prostitutes, or the girl next door.

Conceptually, if not morally, the privatization of corrections is often construed as an "either-or" issue. In fact, however, the issue of corrections relates to prisons and jails, probation and parole, and various nontraditional community-based programs ranging from compulsory drug-abuse treatment to fines and restitution. Most correctional programs have administrative, financial, and construction components, any of which may be public or private. Thus there are numerous possible permutations of private involvement in corrections, only some of which are bound to provoke substantial controversy.

Far and away the most heated part of the privatization debate concerns the private management of prisons and jails. It is here that most of the money is at stake, and here that the moral and constitutional issues seem most thorny. Should the care and custody of citizens detained or incarcerated for the commission (or suspected commission) of crimes be entrusted to nonpublic, profit-making organizations? What benefits, if any, might be expected from private penal administration? Who should manage our prisons, how, and by what authority? The best available answers to these questions can be discovered by examining the historical, administrative, and moral dimensions of the issue.[3]

Yesterday's private prisons

In 1833 Alexis de Tocqueville and Gustave de Beaumont expressed their grave reservations about the role of private contractors in the

[3] For a much more detailed analysis that covers the politics of the issue as well, see my "The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails," in Douglas C. McDonald, ed., *Prisons for Profits: The Privatization of Corrections* (forthcoming).

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administration of penal facilities. They chronicled the horrors of the contracting system in France, and noted that even in the United States, a country whose general penal practices they greatly admired, "the presence of the contractor or his agents in the prisons has been found to be not without its inconvenience."

For much of the nineteenth century and as late as the 1960s, prisons and jails in many parts of the United States were privately owned and operated. In the current debate over private-sector involvement in corrections, these precedents have not been duly acknowledged. In Texas, California, Michigan, Louisiana, Oklahoma, and many other states, all or part of the penal system has at one time or another been administered privately. As a few examples should suffice to show, the premonitions of Tocqueville and Beaumont were if anything too mild. The pre-1980 record of private-sector involvement in corrections is unrelievedly bleak.

In the nineteenth century Texas leased its penitentiary (which survives today as the Huntsville "Walls" unit) to private contractors. For a few dollars a month per convict, the contractors were allowed to sublease their charges to farmers, tanners, and other businessmen. It was not long before the inmates began to appear in poor clothing and without shoes. Worked mercilessly, most convicts died within seven years of their incarceration. Escapes and escape attempts were frequent. Conditions were so horrid that some inmates were driven to suicide, while others maimed themselves to get out of work or as a pathetic form of protest.

The Civil War decimated several penal systems in the South. Louisiana, Arkansas, Florida, Virginia, and Georgia were among the states that responded by leasing out their entire convict populations to private contractors, or by granting contracts for work to be performed behind the walls. Even in the antebellum South, however, contracting was not unknown. The state of Louisiana, for example, began contracting in the 1840s. By the Reconstruction era, the state's prisoners were living under one of the most corrupt and brutal regimes in penal history. Well into the 1940s, the Louisiana penal system was a business administered by leaseholders out to make profits from the labor of unskilled and semiskilled convicts. Public officials used the system as a patronage mill, awarding contracts to friends, relatives, and political loyalists. The same basic story can be told about other jurisdictions.

The era of for-profit corrections, stretching roughly from 1840 to 1960, came to an end in most places largely as a result of three

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factors. First, there were public scandals and journalistic exposés that revealed the contract system's weaknesses. Second, there was a decline in the demand for the kinds of products that unskilled, uneducated convicts could produce, and a concomitant increase in the mobilization of political (mainly labor-union) pressures against the production and sale of prison-made goods. Third, there were politicians and prison officials who—often at great risk to their careers—spoke out against the system and argued in favor of the public administration of prisons and jails.

Clearly, the pre-1980 record of private-sector involvement in corrections is not heartening. But what, if anything, does this history teach us? Are these lessons of the past proper guides for the present and the future? Could such gross abuses occur today, beneath the eyes of a watchful court and a scrutinizing media? The best answer is: probably not, but we should nonetheless be careful.

Private prisons today

Over the last few decades the private corrections profession has made enormous progress. Many of the twenty-odd firms that have sprung up since 1980, no doubt, are fly-by-night enterprises. Several, however, such as CCA, are led by some of the most seasoned and respected corrections professionals in the country. As of this writing, no private institutions or programs have been plagued by serious, systemic cases of inmate abuse or political corruption. Indeed, CCA and its competitors have kept an enviably clean slate.

History, however, teaches us to be extremely wary of the oft-made claim that the slate will remain clean as long as contracts are detailed in accordance with the highest contemporary correctional standards. Writing and enforcing highly detailed contracts may help to guarantee accountability, but it does so only at the expense of administrative flexibility. A major selling point of the privatizers is that they can be more innovative (and ultimately more efficient) than public providers of correctional services. A contract that "counts nails," however, makes it difficult for the contractor to allocate resources freely, to make staffing changes, and so forth. As a public corrections official with years of experience in these matters stated, "Either the contractors will be allowed to run wild as they did in the old days, or we'll make the specifications, regulations, and monitoring so rigid that the firms will become as bureaucratized and inefficient as we are—killing the goose before she lays any eggs."

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CCA officials claim that all of their facilities are accredited by the American Correctional Association. While their claim is accurate, it is also true that the accreditation process leaves much to be desired; some accredited facilities have been among the worst in the nation. And because CCA and its competitors covet accreditation (if only as a rough and ready shield against litigation), they are prone to engage in what critics call "correctional creaming": assuming control of modern, lower-custody facilities where populations are small and offenders are not hard-core (for example, juvenile centers), and staying away from institutions and programs that are more costly and difficult to manage (for example, most existing maximum-security prisons).

One unchanged historical reality about American prisons and jails is that those who are incarcerated in them come overwhelmingly from the lowest rungs of the socioeconomic ladder. Criminologists and others may debate both the empirical and the moral issues related to this fact, but none deny the simple truth that America's prisons house disproportionate numbers of poor, dark-skinned individuals. Historically, race and class prejudices have combined with the low visibility of penal facilities to make the average American unconcerned about what happens inside prisons and jails. It seems likely that societal pressures against inmate abuse and political corruption will be at low ebb when these largely underclass and minority populations of offenders are placed in nonpublic hands. Opponents of privatization worry that the sigh of relief that public officials may breathe after turning over all or part of their penal complex to private firms may presage a "death rattle" for inmates' legal and constitutional rights.

But such possibilities become less frightening in light of the single most important post-1970 change in the operating environment of prisons and jails—namely, the rise of judicial intervention into penal affairs. Since 1970, dozens of correctional systems have fallen under court orders. And while there continues to be disagreement about the causes and consequences of judicial intervention in this area, most experts agree that activist state and federal judges have become a permanent part of the correctional landscape. Although I harbor some serious reservations about the judges' involvement,[4] it is impossible to deny that the courts can and do provide a salutary barrier against any repeat of the kinds of unmitigated horrors that characterized the previous era of for-profit corrections. If anything,

[4] See my "Prison Discipline and Prison Reform," *The Public Interest*, No. 89 (Fall 1987).

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the courts may prove especially eager to hold the feet of the corrections corporations to their well-stoked judicial fires.

With regard to deciding whether the authority to administer prisons and jails ought to be delegated to private contractors, history is an ambivalent tutor, counseling both openness and vigilance. America's last experience with private corrections was hellish, but in the intervening decades much has changed. We can neither dismiss the possibility that problems may recur, nor assert that history is bound to repeat itself. We can, however, gain an additional perspective on the wisdom of privatization by considering its administrative dimensions.

Administration: public vs. private

Most claims that private corrections firms can outperform public corrections agencies rest on two assumptions. The first is that there are significant differences between public and private management, that business firms are necessarily more "efficient," "effective," and "innovative" than government agencies, and that these advantages of private management are universal: they obtain whether the task is picking up garbage or locking up prisoners. The second assumption is that the public sector's administrative experience in corrections has been an unmitigated disaster: prisons and jails have been, and continue to be, horrible places that are horribly run.

In my judgment, both assumptions are false. The former is the product of faulty logic, poor conceptualization, and lazy moralizing; the latter results from an inadequate appreciation of the fact that the performance of public corrections agencies has varied enormously and in ways that are clearly traceable to differences in public-management practices. Let me elaborate.

There is more than human caprice behind the fact that some tasks are in public rather than private hands; there are nontrivial reasons why we have both government and business, both politics and markets, both public agencies and private corporations, both MPAs and MBAs. In the public sector, the relationship between valued inputs (people, money) and desired outputs (less crime, better public health) is often unclear and may even be impossible to specify with any degree of precision; hence "efficiency"—i.e., maximizing output for a given set of inputs or minimizing the inputs needed to achieve a given level of output—is harder to measure. The political and legal constraints on what work gets done, how, and by whom tend to be far greater in the public arena. "Sophisticated" management theories and techniques may or may not help in the private

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sector, but they are almost always more likely to come away limping when applied to public tasks. Such verities about public versus private management have been discovered by successive generations of top-flight businessmen who have entered government service only to find that the lessons of Wall Street have limited application in government.

Nevertheless, suppose we wanted to make hard-and-fast evaluations of public versus private correctional management. What performance measures could we use? Most students of corrections would agree that there is little, if any, clear relationship between institutional penal practices, on the one hand, and rates of recidivism, on the other. Basically, prisons and jails yield an imprecise mix of incapacitation, deterrence, retribution, and rehabilitation—or so we tend to believe. It is quite difficult, however, to specify the relationship between any one of these ends and how penal facilities are managed. There are, however, at least three performance indices that may be less ambiguously related to managerial practices: order, amenity, and service.

By order, I mean the absence of individual or group misconduct that threatens the safety of others behind bars—simply stated, no assaults, rapes, riots, suicides, or murders. By amenity, I mean anything that is intended to increase the inmates' comfort—clean living quarters, good food, color television sets. By service, I mean anything that is intended to enhance the inmates' life prospects—programs in remedial reading, vocational training, work opportunities, and so on.[5]

Measured accordingly, are all of America's prisons and jails simply wretched, or are some of them relatively safe, humane, treatment-oriented, and productive? There are extremist views on both sides of this question, but the available data suggest that public penal institutions have been, and continue to be, a terribly mixed bag: some are clean, others filthy; some are orderly, others riotous; some offer many programs, others none at all; some cost over thirty thousand dollars a year per inmate, others under ten thousand. Certain public corrections agencies have improved over time; others have gotten worse; and still others have changed little, if at all. One thing, however, seems clear: the quality of life inside prisons and jails depends mainly on the quality of penal management. Through more humane and intelligent institutional management, prisons and jails can be

[5] For a discussion of these measures of prison performance, see my *Governing Prisons: A Comparative Study of Correctional Management* (New York: The Free Press, 1987), pp. 11-12 and Chapter Two.

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improved, even when budgets are tight, facilities are dilapidated, and inmate populations are large and dangerous.

A public-prison success story

One remarkable but untold correctional success story is the Federal Bureau of Prisons (BOP).[6] Before the BOP was established by an Act of Congress and approved by President Hoover on May 14, 1930, inmates in federal custody were subject to the arbitrary and often cruel treatment of whichever of seven federal wardens they happened to be assigned to. Inmates ate slop served from buckets, and discipline was harsh. Under its first director, Sanford Bates (1930-1937), things began to improve. Under its second director, the dynamic James V. Bennett (1937-1964), the BOP made an incredible number of positive innovations in the care and custody of prisoners. The BOP's third director, Myrl Alexander (1964-1970), consolidated these gains; its fourth director, Norman A. Carlson (1970-1987), instituted policy directives, recruitment and training programs, and scores of other changes that made the BOP's facilities more safe, humane, and productive. While the BOP has had, and continues to have, its sore spots, its record over the last fifty-eight years provides solid evidence that good public correctional management is possible.

Like the BOP, other public corrections systems have had talented executives, conscientious workers, a prudent penal-management philosophy, favorable laws, political support, and good community relations.[7] Under such administrative conditions, publicly managed prisons and jails have produced what most of us would probably consider acceptable (if far from ideal) levels of order, amenity, and service. The public sector has constructed, financed, and, most important, operated safe, clean, productive, and reasonably cost-effective institutions. The government has administered many prisons and jails at a reasonable human and financial cost.

In the absence of such administrative conditions, however, publicly managed systems have done less well. In some places, prisons and jails have been run by oppressive, uncaring officials; in other places, they have resembled states of nature, in which violent inmate

[6] This sketch is derived from my ongoing study, supported by the National Institute of Corrections, of politics and administration in the agency from 1930 to 1987.

[7] While none of them is (or was) perfect, some of my examples would include the California Department of Corrections under Richard A. McGee (1944-1967); the Texas Department of Corrections under Dr. George Beto (1962-1972); the South Carolina Department of Corrections under William Leeke (1968-1987); and the New Jersey Department of Corrections under William Fauver (1973-present).

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predators rule; in still others, administrations have bounced between the poles of anarchy and tyranny, under conditions that judges have found unconstitutional and average citizens would find repulsively inhumane.

The crucial point, however, is that the administrative performance of public prisons and jails has not been uniformly bad, and there is no reason to suppose that the performance of private facilities would be uniformly good. To believe otherwise would be to believe that there is something magical about the private sector. In the world of the economics textbooks, a world of perfect competition and *ceteris paribus* assumptions, the market *is* magical. In this world, it is certain that efficient market-driven organizations can give us whatever bundle of goods and services we demand, from "widgets" to more complex commodities. But in the real world, organizations—whether public or private—tend to succeed when they combine good workers with sufficient resources under the right conditions, and to fail when they do not.

The core administrative issue here is not public versus private correctional management, but the possibility of *competent* correctional management. There has been, and continues to be, variance in the performance of public-sector corrections agencies. By probing the political, budgetary, and other conditions associated with the better institutions and programs, public managers can learn from each other's mistakes and successes. Rather than abandoning governmental stewardship of prisons and jails, we ought to give public administration a chance.

Who should govern prisons?

For the sake of argument, however, let us suppose that, contrary to the foregoing discussion, corrections corporations can operate successfully on a wide scale, constructing, financing, and managing everything from tiny new community centers to massive old maximum-security prisons. And for the sake of argument, let us concede, without any qualifications, that private firms can indeed maximize services while minimizing costs in an abuse- and corruption-free environment, satisfying all political, legal, and other constraints. In other words, let us grant for the sake of argument that private prisons and jails are eminently feasible. Must it then follow that they are desirable? Is the private operation of prisons and jails, however instrumental it may prove to be in reducing costs and bettering services, justifiable morally? Does the government's responsibility to

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govern end at the prison gates? Who ought to administer justice behind bars?

Behind each of these questions are prior ones. For example, where (or how) does one draw the line between "contractually deputized" private individuals and "duly authorized" public authorities? Since the authority wielded by public administrators is delegated to them by "the people," by what strange metaphysic does the delegation of that authority to private firms constitute any sort of a moral (or constitutional) problem? The fact that "many different officials contribute in many different ways to decisions and policies in the modern state" gives rise to what has been aptly labelled "the problem of many hands"—the problem of deciding who in government is responsible for political or policy outcomes.[8] The private management of prisons and jails, however, brings into focus what may be termed "the problem of whose hands"—the problem of deciding whether the moral responsibility for given communal functions ought to be lodged mainly or solely in the hands of government authorities.

In my judgment, to remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. Regardless of which penological theory is in vogue, the message that "those who abuse liberty shall live without it" is the philosophical brick and mortar of every correctional facility. That message ought to be conveyed by the offended community of law-abiding citizens, through its public agents, to the incarcerated individual. The administration of prisons and jails involves the legally sanctioned exercise of coercion by some citizens over others. This coercion is exercised in the name of the offended public. The badge of the arresting policeman, the robes of the judge, and the state patch on the uniform of the corrections officer are symbols of the inherently public nature of crime and punishment.[9]

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[8] Dennis F. Thompson, "Moral Responsibility of Public Officials: The Problem of Many Hands," *American Political Science Review*, Vol. 74, No. 4 (December 1980), pp. 905-916.

[9] That these symbols are not empty is presupposed in a wide body of public laws. For example, the authors of a thorough 1977 survey of private policing in the United States observed that both "private citizens and private security personnel are generally prohibited from wearing badges or uniforms that might be confused with those worn by public police." Some states (for example, California) go well beyond simple regulations proscribing impersonation, forbidding private police from doing anything that might "create the impression that they are acting under government authority"; other states (New York, for example) prohibit private investigators from "owning, exhibiting, or displaying a shield or badge in the performance of his duties." See James S. Kakalik and Sorrel Wildhorn, *The Private Police: Security and Danger* (New York: Crane Russak, 1977), pp. 331-340, 474-476.

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Rent-a-president?

The moral implications of privatizing the administration of this central communal function—administering justice for acts against the public welfare—can be felt by entertaining morally analogous situations. Suppose, for example, that the issue were not who ought to administer justice to the community's offenders but who ought to administer rewards to the community's heroes. Consider the following hypothetical scenario. You have worked tirelessly on behalf of your fellow citizens. You have discovered a cure for cancer, or negotiated successfully with our foes abroad, or made a major contribution to the performing arts. For your good deeds, you are to receive a National Medal of Honor. The big day arrives. The crowd is assembled on the White House lawn; the Marine Band begins to play. You gaze into the crowd and notice that the distinguished-looking guests (and the "Marine" musicians) have little pins on their lapels that read "MCA" (for Medals Corporation of America). The ceremony is grand. The crowd roars as your name is called and the "president" (better looking than the real commander-in-chief) shakes your hand and embraces you. You know for a fact that by every tangible measure—the physical quality of your medal, the warmth of the presenter, the duration and intensity of the crowd's ovation, and the sound of the music—MCA gave you a ceremony that was far superior to what you would have received had the government and its officials presided. Moreover, MCA spent only one-third of what the government would have spent. Are you satisfied?

Or imagine that a private consulting firm consisting of the nation's wisest, most seasoned, and most widely respected statesmen could do a superb job of selecting our next president, at a tiny fraction of what it now costs to stage primaries and a general election. The very thought sends a moral chill up my spine because I believe, as most Americans no doubt do, that the public, democratic nature of the process of presidential selection has a value independent of the outcome. Thus, in a situation where it was certain that Candidate X was going to be selected regardless of whether the choice was delegated to the presidential head-hunting firm or left in the hands of the voters, I would not hesitate to choose the public process even though it was far more expensive. Indeed, I would probably do the same even if the "private presidents" corporation would select my favorite candidate while the voters would not.

Or suppose that CCA has made it really big. They have proven that they can do everything the privatizers have promised and more. The corporation decides to branch out. The company changes its

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name to CJCA—Criminal Justice Corporation of America. It provides a full range of criminal-justice services: "cops, courts, and corrections." In an unguarded moment, a CJCA official boasts that "our firm can arrest 'em, try 'em, lock 'em up, and, if need be, fry 'em for less." Is there anything wrong with CJCA?

In each case, the relevant human collectivity can be said to have abdicated its duty to reward, choose among, or punish its members—the nation at large its heroes, the electorate its leaders, the community of law-abiding citizens its criminals. Implicit in the "farming out" of such responsibility is a denial of the group's moral integrity. Ought not the nation to express its gratitude directly through the agency of its elected and duly appointed public representatives? Is it not the voters alone who may bestow authority and legitimacy on occupants of the Oval Office? Is it not the community of law-abiding citizens that is offended by criminals and should dole out their punishment?

The moral writ of the community

If every tangible advantage clearly belongs to private management, does it matter whether the corrections officer's patch reads "Corrections Corporation of America" or "State of Tennessee"? Where the governing of prisons is concerned, is management by private hands morally distinguishable from management by public hands? At a minimum, it can be said (both in theory and in practice) that the formulation and administration of criminal laws by recognized public authorities is one of the liberal state's most central and historic functions; indeed, in some formulations it is the liberal state's *raison d'être*. In the opening chapter of Locke's *Second Treatise of Government*, political power itself is defined as "a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws . . . , and all this only for the public good." Criminal law is the one area in which Americans have conceded to the state an almost unqualified right to act in the name of the polity, and hence one of the few places in which one can discern an American conception of political community that is not a mere collage of individual preferences. It is not unreasonable to suggest that "employing the force of the community" via private penal management undermines the moral writ of the community itself.

But what about the argument that the community's moral writ remains intact as long as the pre-sentencing process remains in pub-

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lic hands? Returning to our earlier illustration, one might assert that CJCA would be wrong, but CCA is not. There are at least two problems with this position. First, it rests on the untenable presumption that the administration of penal facilities involves little or no exercise of discretion by the administrators, or at least none that would affect the duration of an inmate's stay or the basic conditions of his confinement. There is a mountain of empirical studies that show how much discretion at every level—from the commissioner's office to the cell block—is of necessity vested in those who run prisons and jails. Any normative case for private penal management that hinges upon a resurrection and acceptance of the discredited notion of a politics-administration dichotomy is prima facie too weak to require a rebuttal.

Second, it is simply unclear how one can distinguish morally between private and public courts, and between private and public policing, and yet see no moral difference between private and public corrections. The logic required to embrace a CCA while rejecting a CJCA stems from a species of moral confusion of the same sort that underlies discussions of the death penalty in which supporters of privatization declare that while corporations may "play jailer" (even for life), only the government should "play executioner." Those who claim that a CCA is morally legitimate have little basis for rejecting not only private police but also private judges, juries, and executioners.

One could imagine the staff of a private corrections firm being put through some sort of "publicization" ritual—raising their right hands, reading the state constitution, saluting the governor, and so forth. But as long as their organization remained private, the chain of delegated authority could be said to have a rotten link.

There is no limit to the number of hair-splitting discussions that can occur on such points. Though I have only scratched its surface, enough, I hope, has been said to suggest that serious moral problems surround (and may weigh against) the private management of prisons and jails.

A better alternative

Privatization efforts have been fueled by the belief that public correctional institutions are too crowded; but the crowding problem is less acute than is commonly supposed. Privatization initiatives have been offered as ways of tightening the reins on galloping correctional budgets, but the public sector has made innovations that promise to reduce the corrections tax bill. Privatization ven-

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tures are driven by the perception that public correctional managers have failed; but the public record is by no means unrelievedly bleak, and in some respects it is quite impressive. The problems of crowding, rising costs, and failed management are most evident in the area of high-security prisons and jails, but at present the privatizers offer no help for these institutions.

When privatization proponents assert that the firms will do better because they, unlike their public-sector counterparts, will be immune to the political, administrative, and financial woes of governmental "red tape," they should be reminded that "one person's 'red tape' may be another's treasured safeguard."[10] Even a cursory review of the historical, political, and administrative issues surrounding private prison and jail management raise grave doubts, and not a few fears, about the prospects of privatization in this area.

The central moral issues surrounding private prison and jail management have little to do with the profit motive of the privatizers and much to do with the propriety, in a liberal constitutional regime, of delegating the authority to administer criminal justice to nonpublic individuals and groups. For much of American history, government has allowed too many of the community's prisons and jails to be ill-managed, under-managed, or not managed at all. Especially in light of the progress that has been made over the last two decades, no self-respecting constitutional government should again abdicate its responsibility to protect and guide criminals in state custody.

The most promising corrections alternative is to get down to the nitty-gritty business of governing prisons well with the human and financial resources available in the public sector, jurisdiction by jurisdiction. Where public corrections agencies have managed their discretion and coercive powers with common sense and compassion, prisons and jails have been relatively safe, clean, and cost-effective. But far too many institutions remain unsatisfactory, and more progress in public correctional management can and must be made.

While private corrections firms like CCA have run admirable juvenile centers and other facilities, we are most likely to improve our country's prisons and jails if we approach them not as a private enterprise to be administered in the pursuit of profit, but as a public trust to be administered on behalf of the community and in the name of civility and justice. The choice is between the uncertain promises of privatization and the unfulfilled duty to govern.

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[10] Herbert Kaufman, *Red Tape: Its Origins, Uses, and Abuses* (Washington, D.C.: The Brookings Institution, 1977), p. 4.

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Missing children, misleading statistics

JOEL BEST

DURING THE 1980s, a small but nasty debate emerged over the number of children abducted by strangers. Competing estimates appeared in speeches, press reports, and testimony before congressional committees. This fall, the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP) will try to resolve the issue by releasing the results of the National Studies of the Incidence of Missing Children. Reporters covering the debate over the stranger-abduction problem seem to assume that these studies' findings will be authoritative.

This debate's history reveals the importance of statistics in bringing social problems to public notice. Proponents of different causes must compete for the attention of policymakers and the public. If missing children capture their attention, then other issues, such as homelessness, are more likely to be neglected. Promoting new social problems becomes a matter of persuasion, and statistics play a key role in this process.

The fear of kidnappings by strangers propelled the missing-children movement into prominence. The movement emerged in 1981, following intense media coverage of the disappearance of Etan Patz, the brutal slaying of Adam Walsh, and the murders of twenty-eight Atlanta schoolchildren. John Walsh, Adam's father, quickly became the most visible missing-children crusader—and a reminder of the reality of stranger abductions. Although the term

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"missing children" encompassed runaways and child snatchings (children taken by noncustodial parents), stranger abductions received the lion's share of the attention. Widely-publicized recommendations that all parents assemble identification files with their children's photographs, dental records, and fingerprints suggested that every child was in danger.

Estimating the problem's magnitude

The crusaders described a stranger-abduction problem of astonishing dimensions. Then U.S. Representative Paul Simon offered "the most conservative estimate you will get anywhere"—50,000 children abducted by strangers annually. Child Find, a leading child-search organization, estimated that parents recovered only 10 percent of these children, that another 10 percent were found dead, and that the remainder—40,000 cases per year—remained missing. In short, the crusaders described a large number of stranger abductions with very serious consequences.

To be sure, everyone agreed that stranger abductions accounted for only a small minority of missing children; estimates for child-snatchings and runaways were far larger. But stranger abductions served to typify the problem: the television movie "Adam" brought widespread attention to missing children, and Adam Walsh came to represent the larger phenomenon. Sociologist Michael Agopian testified that "there are tens of thousands of additional Adams that are not so prominently reported by the media."

The public certainly came to perceive child abduction as a serious problem. Surveys revealed widespread concern. Eighty-nine percent of Illinois parents viewed stranger abductions as a "very" or "quite" serious national problem. Thirty-seven percent of California adults believed that "there is a great deal of danger today of children being abducted by a stranger"—and another 47 percent said that there was "some" danger. A national survey of youth (ages 8-17) found that 76 percent reported being very concerned about the kidnapping of children and teenagers. (In comparison, 65 percent were very concerned about the possibility of nuclear war.)

By 1985, the movement was well established. There was a federally funded National Center for Missing and Exploited Children (NCMEC), and pictures of missing children graced billions of milk cartons and utility bills. The NCMEC was now offering a lower estimate of 4,000-20,000 stranger abductions per year, but the early estimates had a life of their own. The 50,000 figure continues to be quoted—and even higher estimates have appeared. One 1987 child-

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safety guide put the annual number of stranger abductions at 400,000.

These estimates reflect the typical manner in which neglected social problems gain recognition: activists call our attention to them. One feature of past neglect is the absence of official statistics—no one has been charged with keeping track of the phenomenon. Activists inevitably present themselves as knowledgeable enough about some social condition to bring it to our attention. With no official statistics available, this putative knowledge seems to give the crusaders' estimates the weight of authority. The activists seek to emphasize the problem's magnitude and importance; they have nothing to lose by providing big numbers.

In the early stages of social-problem construction, these estimates may be the best—even the only—numbers available. And the media repeat these figures, although they tend to treat them carefully. Thus, the first ABC news story on missing children contained the following statement: "By conservative estimate, 50,000 children are abducted each year, not counting parental kidnappings and custody fights. Most are never found. Four to eight thousand a year are murdered." Press reports routinely attribute statistics to "authorities," "experts," and "estimates." As long as some source actually gave these figures, the press report is accurate: it is true that authorities gave statistic X, even if X is wildly wrong.

The authority of official statistics

Given the ease with which activists' statistics find their way into policy discussions, it is remarkable that the missing-children crusaders' claims came under closer, more critical attention in 1985. Led by the *Denver Post* (which received a Pulitzer Prize for its coverage of the issue), the press began suggesting that the risk of child abduction had been blown out of proportion. The *Post* spoke of a "numbers gap," contrasting the well-publicized 50,000 figure with the sixty-seven FBI investigations of children abducted by strangers in 1984. A *Post* editorial suggested that the actual number of stranger abductions was "fewer than the number of preschoolers who choke to death on food each year." Other journalists and social scientists joined this attack, using the contrast between FBI statistics and the crusaders' estimates as proof that stranger abductions were uncommon. These critics betrayed a touching faith in official statistics.

The press seemed to share the widespread assumption that the FBI has jurisdiction in all kidnapping cases. This is not true. Before beginning an investigation, the Bureau demands evidence that the

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offense somehow violates a federal statute—for example, using the mail to deliver a ransom note, or transporting a hostage across a state line. Only a fraction of the kidnappings "opened"—that is, brought to the Bureau's attention—are found to involve violations of the Federal Kidnapping Statute. In 1984, the FBI decided to investigate 169 of 1,035 opened cases. Most investigations involved adult hostages; the FBI investigated only sixty-nine cases of abducted children in 1984. (The slightly smaller figure that was quoted in the press came from a preliminary compilation.)

These FBI figures were not authoritative measures of stranger abductions. In fact, missing-children crusaders regularly criticized the FBI's reluctance to enter these cases. Several congressional hearings featured testimony from parents of children abducted by strangers—most notably John Walsh—who had found the FBI unwilling to investigate; the Senate Subcommittee on Juvenile Justice devoted one 1983 hearing to this problem. If the crusaders' 50,000 estimate now seemed too high, the FBI figure of sixty-seven repeated by the movement's critics was certainly too low.

In 1985, the media adopted the FBI statistics with the same uncritical enthusiasm with which they had accepted the activists' estimates four years earlier. Of course, the official statistics had an advantage. The press seeks authoritative sources, and the FBI, which has served as the principal source of crime statistics for decades, has great authority. In promoting new social problems, official statistics count more than unofficial statistics. Embarrassed by criticism that their estimates were unfounded, the missing-children crusaders turned to making their own figures official.

Redefining child abduction

The contradictory official statistics made the missing-children cause controversial. In a 1986 congressional hearing, Representative Thomas Tauke of Iowa questioned the accuracy of NCMEC statistics. NCMEC President Ellis E. Meredith responded:

> I don't think anything has surprised me more than this preoccupation with numbers, and the "only 67 or only 68 or only 69." . . . These are little helpless citizens of this country being held hostage, scared to death, totally unable to take care of themselves, being held hostage by terrorists. What is it with the "only," sir?

The missing-children movement gave great weight to its own estimates—until these became the subject of dispute. Once the controversy emerged, Meredith and other crusaders argued that numbers

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were irrelevant; they frequently asserted that "one missing child is too many."

At the same time, NCMEC officials began trying to redefine the missing-children problem: they advocated expanding the domain of stranger abduction, including offenses quite different from those described during the early stages of the missing-children movement. This more inclusive definition will inevitably produce larger numbers, justifying continued concern.

In 1986, the NCMEC responded to its critics by releasing a study of 1,299 recent cases of stranger abduction. Most of these data were collected haphazardly, making it impossible to generalize from the findings. However, the study did include an analysis of police records of every reported crime involving a kidnapping or attempted kidnapping of a child by a non-relative in Jacksonville, Florida and Houston, Texas during 1984. There were 269 such cases. Since these two cities held 0.9 percent of the U.S. population, extrapolation suggests that there were roughly 29,889 stranger abductions nationwide during 1984—a figure that many might consider to be in the same ballpark as 50,000. This extrapolation is easy to challenge, however, because both cities have unusually high rates of serious violent crimes. In 1984, the national rate for murder and nonnegligent manslaughter was 7.9 per 100,000; but Jacksonville's murder rate was 17.7 and Houston's 26.2. Similarly, the rates for forcible rape were 35.7 nationwide, 100.8 in Jacksonville, and 70.3 in Houston. Since the two cities had two to three times the national incidence of serious violent crimes, we can probably halve the extrapolated number of kidnappings, to something like 15,000.

It is important to understand, moreover, what sorts of offenses fell within this study's definition of stranger abduction. The NCMEC researchers included both attempted and completed kidnappings. (Over a fifth of the cases involved an unsuccessful attempt.) And the Jacksonville and Houston cases reveal another pattern: 88 percent of the victims were female, 97 percent were missing for less than twenty-four hours, and the police recorded 61 percent of the cases as sex offenses. In short, most were cases of molestation, albeit technically involving kidnapping (that is, moving the victim to a different place). Nor did the authorities list these offenses as kidnappings: "Only 15% of the reports had classifications that included the words *kidnapping*, *attempted kidnapping*, or *abduction*" (emphasis in the original). In some cases, the victim might have been missing for no more than a few minutes. Without discounting the seriousness of these experiences for the victims, these crimes do not fit the

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image of child abduction promoted by the early missing-children crusaders.

The Jacksonville/Houston data did include some very serious cases: six children were murdered, and at least four were gone for more than twenty-four hours. Unfortunately, the NCMEC's report doesn't reveal whether these categories overlapped. Assuming that the two cities had ten very serious incidents, extrapolation yields a nationwide figure of 1,111 stranger abductions involving either murder or a child's being missing for more than one day. And considering the two cities' high rate of violent crime, we might reasonably cut the estimate in half, to roughly 550 very serious cases.

The importance of definitions

Definitions make a difference. Defining stranger abduction broadly, so as to include attempted offenses and short-term abductions (typically for the purpose of sexual molestation), will produce a statistic of perhaps 15,000 cases annually. A narrower definition—which takes into account, for example, only children who are killed or missing overnight—will lead to a much smaller number, perhaps 550 cases a year.

There are signs that the broader definition is gaining acceptance. Other official agencies have begun to adopt the NCMEC's definition. Thus, a review of missing-children reports in New York State found that 85 percent of all cases involved teenagers, half of all cases were cancelled—i.e., the child was reported found—within four days, and 99 percent of the cases reported in 1985 had been cancelled by May 1986. While the New York records do not classify types of missing children, these findings might seem consistent with a high proportion of runaways. However, citing the NCMEC's claim that many stranger abductions are short-term crimes, the report warns that "there is no evidence that would justify defining New York State's missing children as essentially a 'runaway' problem."

Missing-children activists also support the more inclusive definition. The Kevin Collins Foundation for Missing Children (an organization specializing in the problem of stranger abduction) has criticized criminal-justice record-keeping practices for misclassifying stranger abductions:

> Current police statistics (including the FBI statistics) fail to show that stranger abduction of children is a significant problem requiring national attention to correct it. . . . There is a reason why the current crime statistics fail to reflect a true picture of the numbers of stranger abductions. That reason is that whenever a previous or subsequent crime occurs in

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> conjunction with stranger abduction . . . the crime of abduction (kidnapping) most often ceases to be shown. . . . [Stranger abduction] would be a recognized problem if statistics were kept. . . . When statistics make the problem graphic, police/public attention will be directed to the problem and it will be diminished.

John Walsh put the case for a broad definition in more dramatic terms: "If it was your daughter, . . . and you were waiting for her and she didn't come home for four hours and after that time she came home with bloody underpants and she had been raped, was she a missing child? Damn well she was."

The use and abuse of statistics

The debate over stranger abduction reveals the importance of statistics in the discussion of social problems. Three principles seem clear: big numbers are better than little numbers; official numbers are better than unofficial numbers; and big, official numbers are best of all.

For several years, journalists, politicians, and missing-children crusaders have suggested that research will provide an authoritative measure of the number of missing children. Obviously, how many stranger abductions are counted will depend upon what counts. There are indications that the National Studies of the Incidence of Missing Children will adopt a broad definition. One of the pilot surveys sponsored by OJJDP used a broad definition in phrasing a key question: "Since the first of this year, was there any time when [name] was missing from your household and you were worried about where (he) (she) was, . . . even if it was only for a few hours?" In addition to surveys, the proposed research design includes "a separate study of law enforcement records," in which researchers will select a representative sample of law-enforcement agencies, from which "records concerning all nonfamily abduction situations will be identified." While this says nothing about the definition of stranger abduction, the methodology is similar to that of the NCMEC study.

The problem, of course, is that this research will have policy consequences. However sophisticated the research design, the results are likely to be presented in a manner that will maximize their rhetorical effect. A research report—perhaps several hundred pages long—will be condensed into a brief press release, and that press release is likely to give a single, official number for stranger abductions. If that number is large, it will establish that stranger abduction is indeed widespread.

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In advocating the broad definition of stranger abduction, moreover, those who make claims continue to use frightening language and horrifying examples. Thus, NCMEC President Meredith speaks of little children "held hostage by terrorists," and Jay Howell, the NCMEC's Executive Director, has provided the following testimony:

> Unfortunately, a lot of the children, whether it is Adam Walsh, Vicki Lynn, a lot of the kids that are well known in this country were killed in a very short period of time, so you typically have a scenario where one person kidnaps a child, takes them to a second location, usually somewhere in that geographic area, sexually assaults them and releases them hours later, and sometimes they are murdered.

There is a rule of thumb that the more serious the crime, the less common it is. But activists are aware of the advantages of typifying a problem by drawing their examples from the most serious cases.

A broad definition of stranger abduction will generate high incidence rates. And high incidence rates—especially when they are illustrated with atrocity tales about raped or murdered children—will lead to perceptions that the problem is serious, that new policies are needed. Most missing-children crusaders advocate two sorts of policies: education/prevention and expansion of the social-control apparatus. Currently, parents can choose among dozens of anti-kidnapping books, games, videotapes, ID kits, and other commercial products designed to educate children about the dangers of abduction. Most are reasonably priced, but it is more difficult to calculate the social costs of encouraging both children and adults to believe that terrifying crimes are commonplace. The missing-children movement also emphasizes the need for greater social control: schools should require detailed identification records for every student; police should have the power to hold runaways; federal police powers should be expanded; courts should accept testimony from very young children; and so on. The unspeakable threat posed by the stranger-abduction epidemic justifies these changes; the new policies' potential costs and dangers receive little attention.

Former U.S. Senator Paula Hawkins of Florida, a leader of the missing-children movement, asks: "When you think about it, does it really matter whether the number [of stranger abductions] is 4,000, 20,000, or 50,000? . . . No abstract statistics should distract us from the plight of even one innocent child who is in danger of any kind of exploitation." In fact, those abstract statistics shape our sense of a problem's urgency, which in turn affects policy.

There is nothing unique about the rhetoric of the missing-children movement. Activists routinely offer large estimates. This is particularly true in making claims about crime. Because crime is secretive,

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because it inevitably involves a "dark figure," there are few constraints on the crusaders' imaginations. One million is a nice round number that routinely turns up; we frequently hear that there are a million abused children, and equal numbers of boy prostitutes, runaways, and victims of elder abuse. In each case the problem, because of its magnitude, demands action.

Activists use statistics to persuade; but these numbers must be understood for what they are—part of the rhetoric of social-problems promotion. Statistics are products of social processes, and they can have social consequences. When trying to understand social problems, we need figures we can count on, but we especially need to know what it is we're counting.

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The new ideology of tort law

PETER H. SCHUCK

THE RECENT TRANSFORMATION of American tort law has attracted much attention, and with good reason. On almost all fronts and in almost all jurisdictions, liability has dramatically expanded. It does not seem to matter what kind of party is being sued. Doctor or public official, landlord or social host, government agency or product manufacturer—all are more likely to be held liable today.

Numerous legal doctrines reflect and reinforce this change. Courts have enlarged the concept of "action," a traditional prerequisite for liability, to encompass inaction. In this way, they have placed individuals under a legal duty to help strangers in many situations, thereby hauling new kinds of relationships (and nonrelationships) into the net of tort liability. They have accorded legal protection to new categories of interests, including emotional well-being, freedom from fear of cancer, and avoidance of unwanted children. They have extended the domain in time and space over which defendants' duties apply by imposing responsibility for risks

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that eventuate long after dependents acted and, in some toxic-tort cases, for risks that were scientifically unknowable at that time. They have accepted relatively weak claims of causation, especially in drug, toxic-tort, and medical-malpractice cases, where proving cause and effect is often difficult. They have routinely ignored or overridden express contractual limitations on tort liability, as well as implicit agreements by parties to allocate risk between themselves. They have abandoned or severely curtailed long-standing charitable, governmental, and familial immunities from tort liability.

Presumably, this expansion of liability will not continue indefinitely and without limit. Like other tides in human affairs, it will ebb as well as flow. Even so, one is struck by its duration. Tort scholars appear to agree that liability has expanded steadily since at least the late nineteenth century, when employers' traditional defenses against industrial-accident liability began to erode (even before the enactment of workers' compensation schemes). Some scholars argue that the trend toward wider liability may have begun earlier. Decisions like *Brown* v. *Kendall* (1850), which declared that, in general, liability could not be found without "fault," are an apparent exception to the trend. But Gary Schwartz and some other commentators have suggested that these decisions did not so much put new limits on liability as codify existing limits that had been concealed by earlier doctrines and practices.

Legislatures have occasionally sought to arrest this growth in certain areas; product liability and medical malpractice are obvious recent examples. But as the periodic crises in these insurance lines suggest, legislative intervention has seldom been effective in curbing the growth of liability. And at the same time, these legislatures have been busy expanding liability in other areas (as in the 1986 federal vaccine law) and in other ways (as in new laws authorizing courts to make defendants pay the attorney's fees of plaintiffs). In tort law, however, courts almost always have the last word, and that word has usually been *compensate*.

What accounts for this long period of liability growth? The answer is not at all obvious. In many other areas of the law, after all, the courts oscillate between traditionalism and innovation, self-restraint and self-assertion, and other familiar antinomies. The emphasis in constitutional law, to take one example, has cycled between governmental interests and individual liberties, federal power and states' rights, broad and strict construction. In administrative law, one observes shifts from close judicial scrutiny of agency decisions to greater deference to administrative expertise, and then back to

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"hard looks." Even in private-law fields, such as domestic relations, legal evolution often seems to come full circle. Why has tort liability followed so straight a path?

Institutional developments have surely played an important role. The growth of private liability insurance, for example, has meant that more "deep pockets" are now available to satisfy judgments. But this explanation is plainly incomplete, for expanded insurance has also undercut the argument for compensation through the tort system. Prospective accident victims now purchase more of their own direct ("first-party") insurance against accident losses, and the government has established massive income-maintenance, disability, and health-insurance programs. Coverage is still far from complete, of course, but it is much more comprehensive today than ever before, even when compared with the far larger accident costs—wages, medical costs, pain and suffering, emotional harm, and third-party consortium claims—that the expansive tort law now makes compensable. In short, most accident victims would now be compensated for most of their economic losses even without having recourse to the extremely costly, protracted lottery known as the tort system.

Other explanations of a more sociological kind are equally unsatisfying. Community life in the United States is indeed fragmented, and strangers increasingly demand that tort law protect them from risks posed by people with whom they lack a relationship of trust or shared experience. But this development is not a new one. The anomie and individualism of American culture, deeply imprinted upon our law, impressed Tocqueville more than a century before David Riesman dissected it in *The Lonely Crowd*. And even Riesman's lament antedated the dramatic liability expansion of recent years.

This essay will emphasize a different cause for the expansion of liability: a change in the ideology that courts bring to tort cases. The term *ideology* is not meant pejoratively here. It simply denotes a set of assumptions by contemporary judges that organize and render coherent their perceptions of legal reality. To furnish a fully satisfying account of this ideology, it would be necessary to trace the history of its principal ideas, the social forces that have shaped it, the functions it has served, and the personalities of the individual judges who have implemented it. Such a comprehensive account is well beyond the scope of this essay. For now, it is enough to identify the nature of this ideology, to examine how it leads to expanded liability, and to consider whether the tort law that it has spawned can satisfy its own normative criteria of legitimacy and effectiveness.

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Although the new ideology of tort law is complex and multifaceted, four elements stand out: (1) a profound skepticism about the role of markets in allocating risk; (2) a shift in the dominant paradigm of causation; (3) a tendency to broaden jury discretion; and (4) a preoccupation with achieving broad social goals instead of the narrower, more traditional purpose of corrective justice between the litigants. This last element entails a change in the conception of the judges' role that serves to link, legitimate, and effectuate the first three elements. Needless to say, some of these elements are further developed than others, and few courts have yet taken them as far as have the supreme courts of New Jersey and California (at least until the electoral defeat of several liberal justices in California in 1986). But anyone who has read a large sample of contemporary tort cases will recognize the importance of these elements.

Distrust of markets

Judges' rulings, and occasionally their supporting rhetoric, bespeak increasing skepticism about both the efficiency and the justice of permitting the market to allocate risk. This is most apparent in cases arising from disputes over liability-insurance coverage. One might expect courts to defer to bargains explicitly concluded between insurers and their customers concerning the risks a policy will cover. Yet, as Kenneth Abraham has demonstrated, courts have devised numerous techniques to reshape or interpret insurance contracts so as to provide coverage of risks that the parties never agreed to shift.[1] Although this development has affected all areas of tort law, its implications are especially profound in mass toxic-tort cases. A dramatic example occurred recently in the massive asbestos litigation pending in San Francisco. In that case, Judge Ira Brown ruled that in order to maximize the pool of funds available to compensate victims, all insurers who wrote policies over several decades would be liable for all injuries, regardless of whether any given risk came into being during any given policy period.[2]

In tort law proper, decisions concerning the allocation of risks are seldom as explicit as they are in insurance contracts, and judicial respect for them is correspondingly lower. The courts' skepticism is entirely warranted in many tort disputes in which it would

[1] Kenneth Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* (New Haven: Yale University Press, 1986).

[2] Asbestos Insurance Coverage Cases, Judicial Council Coordinating Proceeding No. 1072, Superior Court, San Francisco Court, May 29, 1987.

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have been prohibitively costly for the two sides to reach some agreement about risk, the classic example being the collision between total strangers on the highway. Such skepticism may even make sense in those cases, also common in tort law, in which the parties could in principle have bargained at low cost about risk but in which one of the parties is a "low-attention" decision maker, to use Howard Latin's phrase.

Courts' disregard for risk markets, however, now extends well beyond these kinds of situations. Increasingly, judges override market risk allocations even in those cases in which both parties are plainly "high-attention" decision makers who have already engaged in actual bargaining over the very sorts of risks that are at issue. Yet many of these decisions serve no evident purpose; they do not even promote a more progressive distribution of wealth.

The traditional approach to such cases is represented by a 1927 Supreme Court decision, *Robins Dry Dock and Repair Co.* v. *Flint.* The defendant, a dry dock, had negligently damaged a ship and rendered it unusable for a time. The plaintiff was not the owner of the ship but a third party who had chartered the vessel and was deprived of its use. The terms of the chartering agreement relieved the plaintiff of any hiring charges in case of such mishap but did not indemnify him for his lost profits, for which he proceeded to sue the dry dock in tort. Justice Oliver Wendell Holmes, Jr. rejected the claim, holding that even if the plaintiff might recover against the owner of the vessel, who might in turn recover against the dry dock, the dry dock owed no direct obligation to its customer's customer. Such an obligation, the Court reasoned, could arise only through contract.

Contrast this decision with the 1979 case of *J'Aire Corp.* v. *Gregory*, in which the California Supreme Court, confronted with roughly analogous facts, had no trouble imposing tort liability. A commercial tenant sued its landlord's contractor in tort for the profits it lost when the contractor negligently delayed completing repairs to the tenant's premises. Both parties had negotiated commercial contracts with the landlord; these contracts presumably took into account the risk to all sides of an interruption of business. The tenant was hardly without remedy, since he could have sued the landlord under the lease and may even have had a direct contract remedy against the defendant as a third-party beneficiary of its promise to repair. For aught that appears, the parties were equally wealthy and equally insured. Moreover, shifting the tenant's loss to the contractor in this situation may well be econom-

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ically inefficient, for two reasons. It may fail to establish incentives that minimize the costs of repair errors, since the landlord and tenant are best situated to allocate that risk between them; and it may require needless administrative outlays in the course of establishing tort liability.

The examples could easily be multiplied. In *Sprecher* v. *Adamson Cos.*, another California case, the court upheld a tort claim by the owner of an oceanfront home in Malibu against his uphill neighbor for failing to install a fence that might have prevented damage from a naturally occurring mud slide. The defendant did not cause the mud slide, the plaintiff could as readily and perhaps more cheaply have erected the fence, the prices of Malibu lots reflect such a common, notorious risk, and Malibu neighbors are remarkably well situated to allocate it among themselves justly and efficiently. Still, the court—rushing to the rescue of downhill members of the upper class—imposed liability. In yet another revealing group of cases, courts have overruled or seriously qualified the long-standing doctrine that prevented third-party investors from suing accountants for neglectfully preparing financial statements for client companies on which the investors relied to their detriment.

Decisions like these reflect what Grant Gilmore called "the death of contract."[3] Gilmore was referring to the courts' growing tendency to resolve contract disputes through principles drawn from tort law, with its relatively fluid legal obligations grounded in social goals, rather than from contract law, with its more structured rules grounded in the mutual consent of the parties. Gilmore's insight must now be extended to tort cases proper, where the courts are increasingly rejecting market risk allocations that would limit legal responsibility for accidental injuries.

New causal paradigms

A plaintiff cannot establish tort liability without proving two analytically distinct propositions. He must show that a particular act or omission is what caused his injury (the "determinate plaintiff" issue), and also that a particular defendant is the one responsible for that conduct (the "determinate defendant" issue). This two-step paradigm of causation, which has governed tort law from its inception, was traditionally grounded in turn on two interrelated ideas: a moral conception of how people are responsible for actions,

[3] Grant Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974).

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and a phenomenological conception of how harmful consequences come about.

The moral conception, closely linked to the norm of corrective justice, emphasized the personal responsibility of each autonomous individual for his actions. A defendant, in this conception, was liable to a plaintiff only if that particular defendant was the agent of harm to that particular plaintiff, and the extent of responsibility determined the extent of liability. The phenomenological conception was based on an essentially Newtonian understanding of how events occur: it posited a set of mechanical relationships between things and events governed by general scientific laws, so that once the defendant's action was set in motion the plaintiff's harm followed in the same way that one moving billiard ball strikes another.

These linked conceptions, of course, did not always furnish satisfactory answers to causal questions in real-world cases; indeed, perhaps no issue has bedeviled tort scholars more than that of causation. But together, the conceptions set important normative and practical limits on tort liability. Recently, however, this traditional view of causation has been challenged by a competing paradigm premised on the contingent character of all phenomena and the inevitably probabilistic nature of all causal statements. This probabilistic view of causation is most salient in cases of mass exposure to toxic hazards, in which it has eroded both the determinate-defendant and the determinate-plaintiff requirements.

The effect on the determinate-defendant rule is illustrated by the well-known 1980 case of *Sindell* v. *Abbott Laboratories*. Women whose mothers had taken diethylstilbestrol (DES) during pregnancy brought a class-action suit against eleven DES manufacturers alleging that the drug caused their vaginal cancers. The plaintiffs could not identify which particular firms had manufactured the DES that each of their mothers had taken. But the California Supreme Court nonetheless permitted their claims to go forward. Liability, the court held, could be found if the defendants' products were interchangeable and companies with a "substantial share" of the DES market were before the court as defendants. Under the court's "market share" approach, each defendant's share of liability for the plaintiff's injuries would be determined by its original share of total industry production of the drug; hence its liability would be based on the probability that its product injured a particular plaintiff, even though it might not actually have done so. This approach plainly attenuates the determinate-defendant requirement. Indeed, it may even eliminate the requirement in some cases, for it means

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that a manufacturer can be liable to a plaintiff who never even used its product.

In mass-exposure cases, probabilistic causation also threatens to overthrow the traditional determinate-plaintiff limit on liability. The *Agent Orange* case, a class action on behalf of 2.2 million veterans exposed to dioxin in Vietnam, demonstrates this development.[4] The causal issue in *Agent Orange* was muddied by the presence not only of indeterminate defendants (because various manufacturers' products had been mixed before being used) but also of indeterminate plaintiffs (because the veterans' symptoms could have had many causes other than exposure to the defendants' products). In approving a class-action settlement, Judge Jack Weinstein endorsed an ensemble of innovations that could vastly enlarge tort liability in indeterminate-plaintiff cases: these include the use of class actions in mass-exposure cases, the use of epidemiological and other statistical evidence rather than "particularistic" evidence to establish causation, and proportional liability for defendants that create any "excess risk" above background levels, however small. (The traditional threshold for liability is creation of a risk that is more probable than not—that is, greater than 50 percent.)

These innovations fit comfortably into what a leading proponent, David Rosenberg, has called a "public law vision of the tort system."[5] It is far too early, of course, for Rosenberg to declare victory. The recent appellate court decision in *Agent Orange*, while essentially affirming Weinstein's rulings, casts serious doubt on future use of this kind of class-action device in most cases, although that device would seem essential if epidemiological evidence and the concept of probabilistic causation are to be made use of in mass tort cases.

Still, these developments, along with some parallel changes in the legislative arena, such as the federal government's passage of the National Childhood Vaccination Act of 1986, place enormous pressure on the traditional view of causation. They may prefigure a fundamental shift in the ruling paradigms, not only of causation but also of tort law itself. Tort law is abandoning its individualistic grounding and groping toward a more collective one. Increasingly, it treats the parties less as idiosyncratic actors than as relatively interchangeable units within large, impersonal aggregations, and

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[4] Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts*, enlarged ed. (Cambridge: Belknap/Harvard University Press, 1987).

[5] David Rosenberg, "The Causal Connection in Mass Exposure Cases: A 'Public Law' View of the Tort System," *Harvard Law Review* 97 (1984): 849-929.

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their actions or injuries less as discrete occurrences than as statistical events within broadly defined classes and populations.

The empowerment of juries

The American jury evokes the mythic symbols of democracy and the living law. It is viewed, especially in tort cases, as the repository of yeoman virtues, community norms, intuitive justice, and common sense. But juries are prone to certain dangers. Their natural sympathies for the unfortunates who come before them can offend the principle of a justice blind to contingencies of wealth or status. Juries, moreover, are neither learned in the law nor elected to legislate. Their proper role is to find facts and apply existing norms, not to discern or make law in a quest for a more just society.

In principle, at least, judges control juries by making procedural and evidentiary rulings and formulating the substantive law that juries are to apply. Rising judicial caseloads, along with recent concerns about the threat that juries can pose to constitutional values, have intensified pressures to fortify these controls. In the *Agent Orange* case, Judge Weinstein granted summary judgment despite conflicts in expert medical testimony on the all-important issue of causation. In three different 1986 cases—*Celotex Corp.* v. *Catrett*, *Anderson* v. *Liberty Lobby, Inc.*, and *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*—the Supreme Court urged lower courts to grant summary judgment more liberally on matters ranging from defamation to antitrust.

But in tort cases, at least, this restraint on juries is blunted, neutralized, and sometimes overborne by powerful forces working to broaden their role. Perhaps the most important of these countervailing forces is the relative ambiguity of most of the substantive rules of tort law. Standards based on "reasonableness" are common in many areas of modern law, of course, but tort law's "featureless generality" (as Holmes once described it)[6]—especially its "reasonable person" negligence standard—probably surpasses that in any other field.

This generality, moreover, is unlikely to diminish in the future. Statutes are seldom used to define standards of care, and even then they are rarely binding on juries. Dogged efforts by judges and legal scholars to make tort norms more specific and outcomes more determinate will always be confounded by the factual richness and diver-

[6] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown & Co., 1881), p. 111.

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sity of the circumstances under which tort disputes arise. In practice, then, tort juries not only find the facts but also supply the normative standards for interpreting and applying them. The latitude of juries has always been great in the United States, but it has steadily grown, as judges have increasingly employed it for broad social purposes. As tort law seeks to regulate relationships and interactions whose value conflicts are harder to resolve, with consequences that are harder to predict, even the most elaborate and refined doctrinal tools are useless unless the jury can answer the kinds of questions that courts now put to it. Those questions, however, often turn out to be intractable.

We can glimpse this dynamic at work in the case of *Barker* v. *Lull Engineering Co.* (1978), in which the California Supreme Court tried to define the concept of "design defect" in product-liability cases through a two-part test. One part of that test requires the jury to decide whether "the risk of danger inherent in the challenged design outweighs the benefits of such design." In applying that standard, the jury is to "consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."

For present purposes, it is irrelevant whether these are the "right" questions for the law to ask, or whether a jury could ever undertake the kind of analysis that would be necessary to address them responsibly and answer them competently. The point is that beneath most of today's innovative legal doctrines lies a broad set of ultimate, policy-laden factual issues that a jury must resolve if the doctrine is to be applied at all. *Barker* is not an isolated example; throughout contemporary tort law, especially (but not only) in toxic-tort cases, courts are busy elaborating new doctrines that pose questions of similar complexity and policy significance for the jury. By multiplying the occasions that call for jury discretion, these doctrines further empower the jury.

In *Rowland* v. *Christian* (1968), another California Supreme Court case, in which a precedent was set that has been followed in other states, the court abandoned the traditional method of evaluating the claims of people injured while on another person's land. Over the course of centuries, judges had used this method to clarify the rights and obligations of landowners and their visitors through rules that limited jury discretion and produced relatively predict-

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able outcomes. In *Rowland*, the court jettisoned this familiar structure, substituting a new legal regime of broad jury discretion. Under this approach, landowners' obligations to persons injured on their property are now decided by juries on a case-by-case basis under a "reasonableness" standard without any meaningful guidance from the courts.

But the relation between expansive new tort doctrines and jury empowerment may run both ways. It may be that jury discretion not only follows but also *generates* the judicial innovations that expand liability. Today's judges often seem to use the jury as a kind of *deus ex machina* to relieve themselves of troublesome responsibilities, doubts, and anxieties. Judges themselves can feel freer to innovate, secure in the knowledge that it will be up to anonymous jurors to determine the concrete meaning and consequences of new doctrines.

Jurors thus serve as a buffer that insulates judges from full responsibility for what happens when their doctrinal creations are implemented. By tradition, the jury is expected to be a "black box": explanation of how it reached its decision is not even permitted (except informally, after the case is over). This lack of accountability encourages judicial irresponsibility (in this special sense). Consider an analogy: if it were somehow made easier for men to conceal their paternity, they would presumably father more children—at least until the children's mothers took a stand. Similarly, when the cost to judges of innovating goes down, it is not surprising that they engage in more of it—at least until legislatures catch on.

If this is so, then an interesting paradox follows. Courts often invoke the principle of cost internalization to justify expanding enterprise liability. But the very same courts fail to apply that principle to the judicial enterprise itself. By relying upon the opacity of jury verdicts, judges can externalize the error and administrative costs of innovative, liability-expanding doctrines onto the parties and the social system as a whole. Any remaining inhibitions about innovation are further reduced by judges' near-absolute immunity from liability for their errors.[7] The paternity analogy suggests that many of the judicial progeny spawned by this incentive structure will be illegitimate.

Changing legal purposes

From the earliest days of the common law, judges have considered how their decisions will affect the larger society outside the

[7] Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983), pp. 90-91.

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courtroom. Sometimes their decisions have invoked explicit social purposes, especially the deterrence of risky behavior. Nor is an emphasis on compensating injured persons anything new; it is central to any justification of tort law. Still, tort law was traditionally and preeminently the domain of corrective justice, which required a wrongdoer to return to a victim what he had "taken." This conception encouraged courts to view tort cases as essentially isolated disputes in which the law's role was simply to allocate losses between two (or among a few) injurers and victims. The court could readily adjudicate such disputes by eliciting from the parties relatively simple, comprehensible accounts of past events. And because the ultimate decision owed much to the specific facts and was not explained by the jury, it rarely constituted much of a precedent for other cases.

Today, in contrast, the law books abound with tort cases that affect not a few individuals but great aggregations of people and vast economic and social interests. The decisions in these cases are preoccupied not with meting out corrective justice between individuals based on their past interactions, but with advancing public control of large-scale activities and altering both the distribution of power and the nature of social values. In such cases, the parties are often little more than quaint anachronisms, mere placeholders for these larger social interests. Even in conventional tort cases, judges and juries increasingly act (and view themselves) as risk regulators, cost-benefit analysts, and social-problem solvers, rather than as adjudicators of isolated, morally self-contained disputes.

This shift toward a more functional view of tort law derives in part from a heightened concern for the goal of compensating victims in an era of soaring medical costs, high litigation fees, and extended life expectancies, and in part from institutional changes, such as the spread of liability insurance, that appear to make compensation more feasible. But the shift goes further. As George Priest has shown, many other functional concepts—enterprise liability, risk-spreading, deterrence through cost internalization, and incentives to produce information—have moved to the center of discussions of private tort law by contemporary judges, scholars, and litigants.[8] Administrative efficiency, another functional goal, dominates analysis of the mass-exposure cases involving asbestos, dioxin, and DES. The same goals animate most of the proposals for legislative tort reform.

[8] George Priest, "The Invention of Enterprise Liability: A Cultural History of the Intellectual Foundations of Modern Tort Law," 14 *Journal of Legal Studies* 461-527 (1985); and "The Current Insurance Crisis and Modern Tort Law," 96 *Yale Law Journal* 1521-1590 (1987).

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The new functionalism, in supplanting the old corrective-justice ideology, has not simply changed how parties litigate tort cases and judges and juries rationalize their decisions. It has also altered the outcome of cases, systematically enlarging the scope of tort liability. Indeed, courts (and most tort scholars) cite each policy goal as a reason to expand liability; ironically, even administrative efficiency, certainly tort law's weakest suit, has been invoked—to justify abandoning negligence rules in favor of strict liability.

The courts have striven to integrate these discrete elements of the new ideology—skepticism about markets, a stochastic view of causal responsibility, broad jury discretion, and a shift to functionalism—into an intelligible, morally compelling world view, in which judges play a central policy role. Most of the courts' justificatory techniques are familiar and not particularly noteworthy. In tort cases, as in others, judges continue to reshape legal doctrine through the repertoire of methods sanctioned by a millennium of the common law. They reclassify legal categories and issues, invoke "changed conditions," choose among competing analogies, select the level of generality at which to characterize facts, carve out and widen some exceptions to rules while narrowing or abolishing others, shift burdens of proof, alter procedural settings, devise new remedies, and regulate juries. Although the case names may have changed, the techniques with which judges make laws and apply them remain the same.

What *has* changed dramatically is the courts' conception of their own place in the ongoing business of government. Traditionally, judges tended to view themselves as adjudicators who effected legal change incrementally through the slow accretion of precedents, moving in directions that were often discernible only in hindsight. Of course, there were always exceptions: judges like Blackburn, Shaw, and Cardozo, who did not shrink from using individual tort cases to propel the law toward one policy goal or another. But even these exceptional judges felt constrained to conceal their instrumentalism by paying conspicuous obeisance to the normative premises of the common law: the rule of stare decisis, the discipline of particularized facts, the obligation to defer to the legislature, and the strong presumption in favor of private ordering. They invoked these pieties even as they flagrantly and creatively violated them.

Today both the pretense and the underlying reality have changed. Not only legal innovators like Roger Traynor and Jack Weinstein but ordinary, standard-issue judges as well increasingly regard themselves not simply as logicians and case analysts but as policy-

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makers and systems analysts. They have become less principle-oriented and more goal-oriented.

The signs of this change can be found in almost any sample of modern tort decisions. The court's opinion usually begins with a perfunctory bow to traditional legal categories and distinctions, followed by a critique of these distinctions as "wooden" or "formalistic." The court then explains why the precedents do not ordain any particular decision in this case, leaving it free to choose the "best" rule. From that point on, instrumental rationality is the mode of analysis: the court identifies the relevant social goals (the current favorites are compensation, deterrence through cost internalization, and loss spreading), then assesses how well these goals would fare under alternative legal rules, and ends by selecting the optimal one.

In these opinions, certain rhetorical features often recur. Plausible arguments, general assertions, and profuse footnoting take the place of hard empirical evidence. The court couples facile conclusions about the perversity of the existing rule with heroic predictions about the excellent effects of the rule being adopted. It characterizes the facts of the case abstractly enough to support broad, rule-like decisions. It further enlarges its discretion by assuming that unless the legislature has spoken to an issue with unmistakable clarity, the court is on its own. It proceeds as if private behavior were infinitely plastic, easily molded by legal rules into new, more functional forms.

Contemporary tort decisions are almost wholly benefit-oriented. Although they often read like a government agency's policy memoranda, they seldom address the kinds of questions about the costs of legal change that would preoccupy any self-respecting policy analyst. It is the rare tort decision, for example, that takes seriously matters like these: the opportunity cost of adopting a particular rule; the institutional barriers to its implementation; the rule's secondary and tertiary consequences; the strategies people will use to evade it; the costs of administering it; the competence of juries to comprehend and apply it; the effects it will have on insurance markets; and its implications for more elusive, difficult-to-measure values like innovation, diversity of choice, and political accountability.

In ignoring or only casually touching on these questions, judges are no worse than most of the professors who train their law clerks —not to speak of the legislators who write the statutes they interpret. Judges are often like architects who are instructed to design a splendid, state-of-the-art edifice but are also told not to worry too much about costs because the money will be found somehow. When

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that is the case, it is perhaps not surprising that they come up with the juridical equivalent of Washington's Rayburn Office Building.

The problem with all this is not that the new functionalism fails to advance some of its goals all of the time or all of them some of the time. It does both. Thus, it succeeds in compensating victims—at least that tiny subset who are fortunate enough to be injured by negligent, fully insured defendants and can gain access to the tort system. And it deters some risk—at least that small subset of activities that tort law's incentives affect. In many cases, the functional approach may well be superior to what preceded it. This is true if today's judges get the rule "righter" than their predecessors, or if the rule that "defendant is almost always liable" is so much clearer than the "reasonable person" standard that people can more easily plan and bargain around it. But any gains of this kind have been purchased at an enormous price in sheer administrative cost. And the real question remains: Do functionalist courts achieve anything approaching the right mix of social goals under the present system?

Beyond the new ideology

Policymaking in this complex world is problematic, regardless of how it is organized institutionally. The real choice is between better and worse ways of structuring it. But however wise or efficacious the courts' central role in accident-cost allocation may be, its *legitimacy* cannot really be doubted. Tort law has always been preeminently a field in which judges initially devise common-law principles to which politicians then react. All that legislators need in order to have their way is a willingness to take political responsibility for the change. They may control judicial rulings by substituting different principles or by establishing administrative regimes to supplant or supplement the common law. But if the past is prologue, they will usually acquiesce in the judicial innovation; future legislative interventions will be confined to a few areas and will not much disturb the central corpus of judicially created tort law.

Even if "liability-insurance crises" did not periodically erupt, there would be ample reason to doubt that tort litigation is a good vehicle for deciding how to distribute risks in society. These doubts remain even (or especially) when one asks the essential question: "Compared to what?" The defects of legislatures and administrative agencies have been demonstrated in great detail. But even a brief comparison of the courts' policy-making capacities with those of legislatures and agencies indicates the severe limitations on courts' competence to perform the kind of policymaking to which their

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new ideology of tort law commits them. The most important comparisons can be grouped under three headings: organizational expertise and rationality, success in implementation, and political responsiveness.

Judges are trained as generalist lawyers (usually as litigators), not as policy specialists. They are unlikely to acquire, or know how to exploit, the kinds of information that competent policy analysis requires. Few litigants possess the resources needed to adduce this information, and most lack adequate motivation to do so as well, such information being in the nature of a public good—one that is often marginal (or even harmful) to their cause. Only a fraction of the many social interests affected by a legal rule are represented by the parties before the court, and the relatively few tort cases that reach trial are likely to be unrepresentative of the social reality that a policy must address.

Finally, courts lack a reliable way to obtain feedback on their policies' real-world effects. They must depend for fresh information on the particular litigants and disputes that happen to come to their courtrooms, and one case is a vehicle for policy change only if it raises the same policy issues as an earlier one, but manages to provide better data for making a decision. Even if the precedent can simply be distinguished, disregarded, or overruled, a court that realizes it has made a mistake may still have to wait for a properly framed new case to come along before changing course.

Perhaps most inimical to a sound policy-making framework are the deep structures of tort law—its vestigial moralism, its adversarial, party-centered control of litigation, its radical decentralization and nonaccountability, its glacial accumulation of precedents, its factual diversity and particularity, and its view of problems only in hindsight, transfixed by palpable human suffering. The new functionalism's rejection of most of these features amounts to the deformation of tort law, and its transformation into something very different.

Even if courts could readily determine the correct social policy for distributing risk, they would be hard put to implement it. The relatively few policy instruments they possess tend to be weak, inflexible, or both. In tort cases, their principal tools are general prohibitions enforced by money damages. With the exception of nuisance cases, all they can do is order A to pay B a prescribed sum of money for breaking a rule. Leaving aside certain cases in which government is the defendant, they cannot impose fines or taxes, subsidize, educate, reorganize, inform, hire, fire, insure, establish

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bureaucracies, build political coalitions, or coerce third parties. The damage remedy they can deploy is undeniably important in shaping some kinds of behavior, but it affects quite a narrow band on the broad spectrum of human motivation.

The need to decide cases on principled grounds also limits courts' ability to implement even sound intuitions about policy. When courts abandon the traditional regime of contributory negligence, for example, they nearly always feel constrained to adopt the alternative approach of "pure" comparative fault, which can be derived from general tort principles, rather than adopting any of a number of "modified" approaches that might make better policy but would require the court to select arbitrary cutoff points. Legislatures that enact reforms in this area, by contrast, virtually always choose "modified" systems.[9]

Courts have one significant advantage: they can ordinarily count on strong political support from the public. As institutions, they enjoy greater respect than markets, legislatures, or most bureaucracies inside or outside government. But adherents of the new tort ideology should not take too much comfort from this public support, which is probably more a product of what courts have traditionally done than a tribute to what they now attempt to do. In fact, the tasks of legislatures and agencies are generally more intellectually demanding, more politically sensitive, and harder to implement than the traditional functions of courts in resolving tort claims. It should come as no surprise, then, that the other governing institutions have seemed to fail while courts remain popular, for they are playing very different games by altogether different rules. As courts increasingly assume the more comprehensive and problematic tasks that their new ideology thrusts upon them, and as the public learns more about how effectively they perform them, one may expect their failure rate—and the general level of public disappointment in them—to rise as well.

[9] Marc Franklin and Robert Rabin, *Tort Law and Alternatives: Cases and Materials*, 4th ed. (Mineola, NY: Foundation Press, 1987), pp. 381-82.

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Poor tenants, poor landlords, poor policy

IRVING WELFELD

A "SATURDAY NIGHT LIVE" routine, in which Eddie Murphy (playing a convicted murderer) recites a poem entitled "Kill My Landlord," tells us a great deal about the public image of American landlords. The owner of rental property operates in a hostile environment. Although his search for profits is no different from that of other providers of goods and services, the landlord is traditionally cast in a uniquely villainous light; he is the fat cat who takes unfair advantage of the little mice who rent from him. The metaphor is unfair, however; many landlords have as good a claim to victim status as their tenants.

The landlord plays an essential role in America's housing system. There is always a substantial number of people who choose not to own, or for whom ownership may not be a good idea. In the pre-condominium past (before 1961), when apartment living and renting were synonymous, the rental sector could count on the newly married, those who were single, and inveterate urbanites. Even today, rental housing is necessary for the highly mobile, the poor, and the financially insecure.

One would assume that the negative image of landlords derives from their rent-gouging practices, and from the high profitability of

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real-estate investment. But this assumption is not supported by the facts. Reviewing rent increases and the change in the value of rental property in the 1960s and 1970s, Anthony Downs concluded as follows:

> Residential rents did not increase as fast as consumer income, operating costs, or construction costs. . . . The best available estimate is that real rent levels fell about 8.4 percent from 1960 to 1980. . . . In 1980 rents would have had to be 77 percent higher than they actually were to support real market values equivalent to those in 1960. . . . Putting the conclusion another way, the real value of rental housing properties in the United States *sustainable from rents alone* appears to have fallen substantially since 1960—perhaps by 50 percent or more. The enormous drop results from much faster increases in operating costs and rates than rents.

The phenomenon is not a new one. As Louis Winnick wrote in the 1950s,

> there is little doubt that the present generation of investors as a group has lived through a long period of relatively poor earnings as owners of rental property. On the basis of historical records of operating experience, the free and clear return on residential real estate, related to original acquisition cost, was quite unfavorable from the end of the 1920s to the 1950s.

This suggests that the bad reputation of landlords has more to do with consumer psychology and the nature of the product and service sold than with the economics of rental housing. Roger Starr makes this argument in "The End of Rental Housing" (*The Public Interest*, Fall 1979):

> The major difference between landlords and other kinds of entrepreneurs is that the landlords are involved in a long, continuing relationship with their customers, one in which the customer pays over and over again for what he already has—i.e., access to an apartment that in the very nature of things is a little bit older and worse each month. . . . The tenant cannot truly understand why he should be asked to pay again for something the landlord already made. Renewing a lease on an apartment is not like buying a new suit or a steak. . . . Perhaps they cost more than the previous suit or steak—but they are new, and the purchaser is thrilled at the prospect of eating a fresh sirloin, or wearing a new suit for the first time. An economic relationship in which the supplier cannot increase his volume except by raising his unit prices, and the customer has no psychological satisfaction to show for each new expenditure of money, inevitably produces severe tension and government intercession. As society matures and takes the productive process for granted, the intercession inevitably favors the tenant.

The economics of rental property

If tenants misunderstand their landlords, economists are puzzled by them. For landlords have not acted like economic men. Operat-

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ing costs rose and vacancy rates dropped in the late seventies; but landlords failed to raise rents, so as to maximize the return on their investment. How could they make a living, having ignored the economists' market models?

Landlords act as they do because for the most part they are small-scale operators. While there are few reliable national data on the subject, Anthony Downs hypothesizes that

> ownership is scattered among many small-scale landlords. My impression is based on the high percentage of rental housing containing fewer than five units [60 percent] . . . and [on conversations with] realtors and investors across the nation. . . . Small scale investors who manage their own property rarely take full account of the cost of their time. So they have lower management costs—both apparent and real—than large scale operators who employ professional management and maintenance personnel.

This subjective impression is supported by a survey of owners in New York City, the area in which one would most expect to find large-scale ownership of property. Arthur D. Little, Inc. found that 60 percent of landlords own only one building. Of those who bought buildings in the last five years, 68 percent own only one building. In over 60 percent of the cases, the owners are making less than a quarter of their income from their rental investment. The majority of the owners had incomes between $10,000 and $40,000.

Small-time operators with only a few units must act much more conservatively than large-scale operators do, or theoretical economic man would. An owner with only a few units has a stronger incentive than a landlord with more units to avoid raising rents so fast that vacancies increase. The turnover of an apartment usually involves the extra cost of repainting and/or redecorating, and the cost of finding a new tenant. More important, a vacancy for a small-time landlord involves the loss of a substantial portion of the income generated by the building. As a result, writes Anthony Downs, "this situation, plus the high rate of normal turnover among renters [in 1980, 37 percent were living in their unit for less than a year] makes most small-scale landlords *turnover minimizers* rather than *rent maximizers*."

The eighties have seen a major change in the availability of rental housing. In the third quarter of 1987, the vacancy rate was at its highest level in over two decades. Two million and nine hundred thousand year-round rental housing units were vacant—8.1 percent of the national inventory. In cities, the rate was even higher (8.9 percent). Nevertheless, there are cries of a housing shortage all across the land.

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The problems of the poor

An adequate housing supply can coexist with a housing shortage for families and individuals who cannot afford to pay the rent for the available housing. Housing does filter down—but if the landlord's rent roll does not equal his operating expenses, the housing will filter right out of the market.

There is no more graphic illustration of this problem than the *in rem* program in New York City that attempts to prevent the abandonment of properties in serious tax arrears by means of a rapid foreclosure procedure. As of 1984, the city owned 120,000 units. In spite of an ambitious effort to save these units by management and rehabilitation programs, auction sales with favorable financing, and sales of vacant buildings to community organizations at favorable prices (in some cases, involving transfer of ownership to urban homesteaders and tenants, there was no price at all), the city has been left with 74,000 units that are either vacant or so dilapidated that they are effectively lost from the inventory. And for every city-owned unit lost since 1970, two units in the private sector have been lost—amounting to a total loss of over 200,000 units.

At the same time, the city is the home of homeless people, like "Rachel and her children." Even if we add the "housing homeless" to the number of homeless people whose problems cannot be solved by housing alone—we are not now a saner society than we were a generation ago, despite the fact that the number of residents of public psychiatric institutions dropped from 559,000 in 1955 to 122,000 in 1981—the total number of lost units is approximately four times larger than the number of homeless people.

When things get tough in the rental market in general, they get even tougher for the poor in particular. This is the conclusion of a memorandum from the Harvard-MIT Joint Center for Housing Studies:

> The changes in the rent burden distribution for the poorest households were particularly dramatic. . . . By 1983 the median rent burden for households in this income class had risen to 46 percent of income, and over one-quarter of the households . . . had a rent burden above three-quarters of income. . . . These results must be interpreted with great care. . . . These rent burdens are based on a household's cash income and therefore exclude income in kind, such as food stamps and Medicaid. Between 1974 and 1980, the in-kind benefits . . . increased significantly. As a result, the figures . . . overstate the increase in rent burden as a percent of total income. . . . One study estimates that including all such benefits reduces the median rent burden for the lowest one-fifth of the income distribution from 62 percent to 39 percent.

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From the perspective of poor tenants the problem is excessive expenditures. From the perspective of the uneducated landlord (half of New York City's landlords never graduated from high school), the problem is insufficient revenues. The tenants with the highest rent burden are living in the lowest-priced units. In other words, the poor pay less, but doing so hurts them more (see Table I). This can be seen vividly in an area in which, contrary to popular assumption, the median rent is a bit lower than the national average—New York City. (In 1984 the average New York rent was $330; the national average was $331.49.)

Table I. Rents and Rent Burdens in New York City[a]

Area	*Median Gross Rent (In dollars)*	*Median Renter Income (In dollars)*	*Rent Burden (In percentage)*
South Bronx	263	6,874	47
Northwest Bronx	333	13,984	29
Northeast Bronx	310	12,421	30
North Brooklyn	274	8,968	37
Central Brooklyn	340	11,854	34
South Brooklyn	333	13,938	29
Northwest Manhattan	309	11,235	33
Northeast Manhattan	222	7,071	38
Upper Midtown	463	23,006	24
Lower Midtown	476	26,801	21
Lower Manhattan	291	12,784	27
Northwest Queens	347	15,468	27
Southern Queens	354	15,630	27
Northeast Queens	403	19,648	25
Richmond	373	15,761	29

[a] *Source*: Michael A. Stegman, *Housing in New York: Study of a City, 1984*, p.23.

New York City is burdened with an arcane and byzantine system of rent control, rent stabilization, and regulation that is designed to alleviate the plight of the poor and lower-middle-income renter. In practice, however, the greatest benefits of the system are accorded to the rich and famous. As William Tucker writes:

> 135 Central Park West [is] a magnificent ocean-liner of a building with stunning museum-sized apartments that could easily command five to ten thousand on the open market. . . . [The] tenants are all rent regulated. Consequently [the] rent roll looks like this. Carly Simon pays $2208.75 for ten rooms overlooking Central Park; Mia Farrow pays $1870.31 for ten rooms overlooking Central Park; Whitney Ellsworth, publisher of the *New York Review of Books*, $1587.22 for ten rooms overlooking Central Park; . . . Jean Stein, heir of the MCA fortune, pays $1241.39 for ten rooms overlooking [the park]; James Levine, music director of the Metro-

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politan Opera, pays $1156.50 for six rooms overlooking the park. . . . Manocherian [the owner] says he loses $100,000 a year on the building. He keeps it for sentimental reasons (he lives there himself), plus the ever-faint hope that one day one of his tenants' great-grandchildren may die without an heir and the rights to the apartment will revert to one of his own great-grandchildren, who may be able to rent the apartment at something like its market value.

Rent control does not benefit the poor, by contrast, for whom it is almost irrelevant. Given the low income of such a large sector—one quarter of all New York renters were paying at least 50 percent of their income for housing in 1984—it would be almost impossible for landlords to squeeze out higher rents, even in the absence of rent control. As Michael Stegman, the leading authority on New York City housing, politely wrote in a report to the administrators of the New York City system: "The more serious challenge to maintaining a healthy rental market might result from limited incomes of households who must depend on the rental market to meet their housing needs, rather than from any unresponsiveness of rent regulations to the cost of providing decent housing."

Low-income landlords

The most ominous occurrence in the New York City rental market is the rise in operating and maintenance expenses as a percentage of rent. In an earlier report, Stegman pointed out that this ratio had risen from 55 percent in 1971 to 70 percent in 1981. The rise meant that the percentage of the rent dollar available to cover vacancy losses, pay debt service, and yield a profit had declined from 45 to 30 percent. Table II (which uses 1981 figures) illustrates the devastating effect of this decline on property values.

Table II. Median Operating and Maintenance Expenses for New York City Landlords, 1981 (In dollars)[a]

Rent (New York City Median)		265
Taxes, fees, and permits	49	
Labor	30	
Fuel and Utilities	66	
Contractor services	19	
Administration costs	11	
Other	11	
Total operating and maintenance expenses		186
Vacancy losses (assuming 10% vacancy)	26	
Total costs		212
Remaining income available for debt service and profit		53

[a] *Source*: Stegman, *The Dynamics of Rental Housing in New York City*, 1982.

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If we assume no profit, an 11 percent interest rate, and an amortization period of 15 years, $53 would support a $5,000 mortgage. If the potential buyer wanted 10 percent of the rent as profit (a reasonable amount), the resulting $27 for debt service would support a mortgage of about $2,500 a unit. Thus, while apartments along Central Park may be worth up to fifty times the annual rent as cooperatives or condominiums, a seller a few miles uptown who obtains a price *equalling* the annual rent is doing well.

The battered but unsung heroes of the fight to provide housing for the poor are the owners who have kept many of their buildings open despite these adverse economic conditions. They are not absentee landlords living on their suburban estates. Sixty percent of New York building owners own only one building, and 61 percent of the owners of buildings with fewer than ten apartments live in their building.

These landlords are not wealthy. More than half of them were not born in the United States, and of owners who have bought within the last five years, over 35 percent are either black, Hispanic, or Asian. Thirty percent reported household incomes of under $20,000, and 9 percent incomes of less than $10,000. They did not buy their buildings because real estate provides a tax shelter. Although there are no statistics on the relation between the income of landlords and that of their tenants, people generally have landlords of their own social class.

What keeps these buildings going is quite often the "sweat"—as we saw above, there is very little equity—of the landlords. Thirty-nine percent of all New York City landlords collect the trash themselves (another 5 percent use unpaid relatives); 36 percent clean the public areas; 31.4 percent do minor plumbing repairs; 32 percent do minor electrical repairs; 23 percent repair leaky roofs; 87 percent collect the rent themselves; and 82 percent keep the books themselves. Almost half of the owners spend two to four days a week on the operations of their building, and only 16 percent receive any salary.

Yet in spite of these economies, only a third of the landlords were making money on a consistent basis, with the remainder either breaking even or losing money. Thirteen percent of the owners had to subsidize their buildings' operating expenses every month, and a further 16 percent had to inject cash during the heating season. Since these statistics cover all New York landlords, it is likely that the situation of landlords serving the poorest tenants is even worse. And even though many owners are also spending money on capital

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improvements, only 20 percent filed for rent increases—in no small part because of the amount of red tape confronting a landlord who asks for one.

The increase of improvements in the bottom end of the market is subtantiated by Stegman's analysis: "Of all the units that have been counted as dilapidated at least once since 1978, only 2 percent were dilapidated at the time of all three Housing and Vacancy Surveys. . . . This suggests the chances a housing unit in serious disrepair will ever be improved are very good."

The conclusion to be drawn is that it is possible for landlords to make a modest profit on buildings that serve low-income tenants—if the debt service, taxes, and vacancies are low, and the owner is handy and has time on his hands. Nevertheless, the operation is marginal. All it takes is one major malfunction—a boiler that needs repair, or a roof on which there is no room for new patches —to bring the whole financial structure down, and to put the landlord and his tenants on the street.

A misguided policy response

The federal government's response to this situation is minuscule and misguided. Although the government has focused on the problem of affordability, its housing-assistance programs—the Section 8 Housing Certificate and Housing Voucher programs—will do little to solve it. Very little of the money the government saved by moving out of programs to produce housing for the poor is going toward assistance. For Fiscal Year 1989 (which starts October 1, 1988), the Administration is proposing 100,000 additional subsidy vouchers for the entire nation, when New York City alone could use more than 500,000. Even worse, the program is unlikely to find its way into the lowest-income rental sector, where it is needed most.

The government seems unaware that there are two separate problems at the bottom of the housing inventory—the tenants' and the landlords'. Not only are the landlords in the low-rent sector not making huge profits, but many even risk being bankrupted. Their tenants are more or less in the same position: housing is a large financial burden for them, and they are in danger of joining the ranks of the homeless if there is any interruption in their income.

The two assistance programs run by the Department of Housing and Urban Development (HUD)—the Housing Certificate Program and the Housing Voucher Program—do not address the two-sided nature of the problem. Both programs offer assistance to tenants in private housing that meet quality standards, but the programs dif-

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fer in the way they determine housing assistance payments.[1] The programs are aimed at providing tenants with average housing (the fair-market rent is set at the forty-fifth percentile of rents for recent occupants in the local housing-market area), with rents at or near the median of the market. A comparison of the two programs found that the average nationwide rent paid by a sample of non-elderly recipients of the certificate was $431, and that of voucher recipients was $467. The respective average subsidies were $314 and $292.

This is an extravagance that neither the nation nor poor people can afford. The larger the per-unit cost, the smaller the number of the program's beneficiaries. The extravagance is compounded when a poor non-recipient is evicted for failure to pay the rent, and is then penalized by a system that provides expensive, but not decent, hotel and motel rooms to live in.

We are confused about our housing obligation to the poor, and the poor are suffering for it. Our obligation is to provide decent housing, not average housing. And in America today, below-average housing is for the most part quite decent.

A better policy

A new housing-assistance approach is needed, in which a household's subsidy would be determined by its interest in housing—its rent-income ratio. A family unwilling to pay 20 percent of its income would receive no subsidy. The program would then provide a strong incentive for the household to spend more than 20 percent, by subsidizing a large portion of the incremental rent over the 20 percent level (in Table III, $18 for every additional percentage point of rent-to-income ratio), until 25 percent is reached. For ratios between 25 and 30 percent, the federal government would pay less; the subsidy would drop to $15 for each percentage point increase. And for ratios between 30 and 35 percent, the federal share would drop to $12. The government would not share any increase in cost when the rent rises above 35 percent.

[1] The Certificate Program determines what a family could afford to pay from its own resources for housing (which is calculated to be 30 percent of its income), and then makes up the difference between this amount and the gross rent charged by the recipient's landlord. The tenant is generally not permitted to rent units with rents that exceed the HUD-determined "fair market rent." The Voucher Program starts with a payment standard that is equal to the "fair market rent." The housing-assistance payment is generally the difference between the payment standard and 30 percent of income. Unlike the Certificate Program, the Voucher Program provides a payment that is not tied to the actual rent paid by the recipient; the family is allowed to rent a unit at any rent level, as long as it meets HUD's quality standards.

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Table III. Hypothetical Schedule of Subsidies for Housing-Assistance Program

Rent-to-Income Ratio (In percentage)	*Monthly Assistance Payment (In dollars)*
Less than 20	0
20	18
21	36
22	54
23	72
24	90
25	108
26	123
27	138
28	153
29	168
30	183
31	195
32	207
33	219
34	231
35	243
More than 35	243

The basic subsidy (Table IV) is set for a three- to four-person household, and varies directly with the size of the household.

Table IV. Monthly Subsidies by Family Size

Family Size	*Percentage of Monthly Assistance*
1-2 persons	85
3-4 persons	100
5-6 persons	115
7-8 persons	130
9-10 persons	145

The program would enable a four-person household with an income of $6,000 to obtain an apartment with a monthly rent of $118 if it wished to pay 20 percent of its income; $233 if it wished to pay 25 percent of its income; $333 if it wished to pay 30 percent of its income; and $418 if it wished to pay 35 percent of its income.

There is no magical quality to these hypothetical numbers. The subsidies set forth could be revised to suit various political and economic dictates. The level of the subsidy must satisfy two conflicting objectives, however: it must be high enough to give poor households a choice of decent units, and it must be low enough so that the eventual expansion of the program to all eligible families is acceptable to taxpayers not directly benefiting from the program.

There should be no free rides. If a family prefers improved housing, it should prove it by bearing a portion of the additional rent.

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The government should be generous, but it should not encourage extravagance. By providing a declining subsidy and by getting out at 35 percent, the government recognizes that a family's income must provide it with other things besides housing. At the same time, the government grants the family the freedom to allocate its resources as it sees fit.

I would suggest that the assistance initially be targeted to the tenants in the lowest rent sector of the market.[2] That is where both the tenants with the greatest need for help with their rent burden and the buildings with the weakest fiscal foundations are to be found. Although tenants would be able to take their subsidy and move elsewhere, the absence of a federal quality standard would mean that they could take the subsidy and stay in a less than perfect building. A recent study showed that 40 percent of the recipients of Housing Certificates and Vouchers could not use them, since they could not find units that met federal quality standards. In New York City two out of three recipients of certificates were unable to use them.

If the approach that I am recommending were applied in the three areas of New York City in which tenants have the highest rent burdens (see Table V), the burdens would be substantially reduced at far less cost to the government—even if we were to freeze the tenants' income at a 1984 level, and increase their rent by $30 a month.

Table V. Effects of the New Approach in New York City

	Old Rent	*New Rent*	*Income*	*Old Burden*	*New (Post-Subsidy) Burden*	*Subsidy*
South Bronx	$263	$293	$6,874	47%	27.0%	$138
Northeast Manhattan ..	222	252	7,071	38	24.9	106
North Brooklyn	274	304	8,968	37	25.2	111

Since landlords of low-rent buildings have to be selective about their tenants—given the precarious nature of their operation—the "housing homeless," most of whom became homeless because of nonpayment of rent or deviant behavior, would probably not be welcome even if their rent were subsidized. They might, however, get a better reception from a landlord who had moved away from the brink of financial disaster—particularly if the program allowed for a rent increase equal to the cost of housing an evicted tenant for one night at a less than quality inn.

[2] For a detailed explanation of the program see my article, "Improving Housing Allowances," *The Public Interest*, No. 66 (Winter 1982) and my forthcoming book, *Where We Live*.

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From horse carts to minimills

MARTIN T. KATZMAN

EXEMPLIFYING the nation's diminishing international competitiveness in manufacturing, American steel production has fallen from 150 million tons in the peak year of 1973 to 80 million in 1986. Many Americans are pessimistic about the future of our basic industries, and they cast blame in many directions—incompetent management, excessive wages, archaic work rules, and oppressive regulations. There would be cause for national celebration if we could discover a way to nurture industries that provide entrepreneurial outlets for people with little capital, help semiskilled workers reach the first rung of the job ladder, clean up the environment, conserve energy, and contribute positively to the balance of payments.

Such a model indeed exists: the scrap-metal recycling industry. For over three generations, metal recycling has provided an outlet for entrepreneurship. Over six thousand businessmen offer roughly forty thousand semiskilled workers their first chance at a steady job. Long before environmentalism emerged as a political movement, scrap recyclers had been profitably scavenging the city and countryside for discarded materials. The industry turns what would otherwise be unsightly refuse into $8 billion worth of useful raw materials. In doing so, it reduces the need to extract virgin raw materials

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from ore; the result is enormous savings in energy. Benefiting from America's reputation as a nation of profligate consumers of disposable products, scrap-metal recyclers consistently contribute a surplus to the nation's overall balance of trade. Amid the decline of the steel industry, ferrous-scrap recyclers support the beginnings of its renaissance, as embodied in the minimill.

The story of the scrap-metal industry encapsulates many themes of American life. One is the realization of the American dream. The modern scrap-recycling system was developed disproportionately by Jewish immigrants arriving at the turn of the century. Another theme is the restructuring of the steel industry. Here the most important actors are the minimills, which have helped stave off foreign competition and have expanded production in a shrinking market. Without a steady supply of low-cost scrap iron, minimills could not survive. Finally, the scrap-metal industry illustrates how white-hat activities, which do well by doing good, are not always nurtured by government policy.

The task of the scrap-recycling industry is to seek out materials at their source, to provide the disposer with an incentive to deliver the scrap instead of throwing it away, to transport the scrap to collection points, and to sort it into useful lots. A successful scrap dealer has to have an eye good enough to distinguish between the wheat and the chaff in a pile of junk. He has to know which markets offer the highest price for different kinds of scrap, what it costs to transport scrap to market, and what it costs to process scrap into usable form. Using these calculations, he knows what to bid for a farmer's rusted plow, a housewife's broken pot, or the hidden metal beams in a building slated for demolition. Scrap recycling reverses the customary progression from wholesaling to retailing. In recycling, materials are collected by small-scale processors for ultimate delivery to the manufacturer—in this case, the mill or foundry.

Using scrap instead of mining ore saves energy. In making steel, melting scrap takes about 60 percent as much energy as extracting iron from ore. In making aluminum, melting scrap takes only about 5 percent as much energy. Offsetting the energy-cost advantage of scrap are the complex logistics of collecting and sorting. The balance of these forces has changed over time.

The scrap-recycling system now runs like clockwork. But this was not always the case. More than any other group, Jewish immigrants seized the opportunity to organize the scrap-supply system for the metal industry. To a large extent, they capitalized on the same cultural assets that proved useful in other areas of small mer-

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chandising: an understanding of the value of information, an ability to anticipate emerging demands, extended family that provided credit and labor, and a willingness to invest in the future. While the work of processing scrap was arduous, high levels of mechanical skills were not essential.

The founders

The evolution of the scrap-metal recycling system can be traced through three generations of a successful family, a fictitious composite drawn from oral histories. Polish-born Jake Goldstein arrived in New York around 1905 and began his career as a peddler. With the help of some distant cousins, Jake got a job delivering dry goods in a horse-drawn cart to general stores in Virginia, many of them run by Jewish immigrants. An eligible bachelor, Jake was always a welcome guest at the homes of the shopkeepers, especially those with maiden daughters. Over dinner-time conversation, he kept his ears attuned to what the local farmers had to buy and sell. Casting about for return loads, he noticed that blacksmiths kept rusting junk piles of worn horseshoes behind their barns. He offered to buy them for a few cents per hundred, trucked them back to Norfolk, and dumped them in the lot of a wholesaler. Prospective fathers-in-law passed the word to their customers that a young peddler was interested in buying scrap. Soon, broken ploughs and pots, and even hides, were left for Jake at the general stores until his next trip. The residents of the Piedmont appreciated receiving money for trash that would otherwise have merely rusted or rotted away.

When he began, Jake had no idea that the wholesaler eventually shipped the scrap to a steel mill near Philadelphia. With lots too small to interest the mill, he was in no position to bypass the wholesaler. As his volume increased, Jake decided to become a wholesaler in his own right. In 1910, he married Sarah Shapiro, a girl he had met in the Carolinas; the couple settled in Norfolk. He found an abandoned coal yard that had all the prerequisites for a successful scrap operation: a scale, a railroad siding, and a small office. With simple equipment—a hammer and chisel to break up old machinery, and a wheelbarrow to move material—Jake began processing scrap. He now had the capital to pay cash to the new peddlers who took his place in the hinterland, many of them *landsmen*. He took in his newly arrived nephew as an assistant, while Sarah kept the books and raised their two boys.

Goldstein Metals prospered; Jake shipped scrap to the big steel plant near Philadelphia, and also to Japan. Even though the steel

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mills depended upon his reliable shipments of high-quality scrap, Jake never escaped the ethnic slurs of their purchasing agents.

Jake participated in all aspects of the business—buying, selling, breaking scrap, and operating the new crane. He bought a pickup truck that enabled him to handle the large girders from demolition jobs. By 1920, Jake had to hire nonfamily laborers for the first time. All the while, Jake groomed his two sons, Sam and Harry, to join him. Both boys were sent to the University of Virginia, but the Depression interrupted their education. Aspiring to cleaner work, Harry eventually became an accountant in New York, but Sam found the scrap business challenging.

Until the 1950s, there had been little change in the technology of scrap processing. The horse carts of the peddlers were eventually replaced by trucks, but the basic operations of buying, loading, manually breaking, sorting, and selling remained the same. Large cranes with powerful magnets were introduced to facilitate the handling of materials. Nevertheless, scrap processors could not cheaply process huge volumes on demand, and scrap remained fairly expensive compared with its competitor, pig iron.

By the late 1950s, productivity-increasing innovations had become available. New hydraulic shears could cut six-inch-thick girders down to a size that could be fed into a steel furnace. The balers, made famous in a grisly scene from *Goldfinger*, could squeeze the bulk of an automobile into twelve cubic feet. Cutting metals down to size lowered the costs of handling and transportation. Furthermore, scrap that could fit into the openings of steel furnaces was more valuable to the mills than uncut metal.

By the 1970s, the shredder had become the centerpiece of the scrap yard. This million-dollar piece of equipment is essentially an industrial-strength Cuisinart, chopping thin sheets of steel, such as automobile and appliance hulks, into fist-sized pieces. The residue is then sorted into the homogeneous bundles required by mills and foundries.

This metallic ground-round is magnetically sorted into ferrous and nonferrous streams. The ferrous metals are a potpourri of iron alloys with different metallurgical properties, which cannot be separated after shredding. Nevertheless, shredded iron is highly valued for its physical and chemical properties, and it commands a higher price than most iron scrap.

In the nonferrous stream, blasts of air separate the dust, rubber, and upholstery (or "fluff") from the valuable aluminum, zinc, and copper. A few processors separate the heavier brass, copper, and

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zinc from the lighter aluminum and plastic by causing the latter to float away in a specially prepared liquid. It is currently impractical to separate the brass, copper, and zinc from each other by mechanical methods, so these are exported to East Asia for manual separation.

The third generation

Today's scrap-processing yard has small workshops that specialize in particular jobs. In one corner, rusted oil tanks are sliced by torch. In another, a fork-lift driver dumps rolls of telephone wire into a small shredder that strips the insulation from the valuable copper. Elsewhere a magnetic crane dumps clippings from an automobile plant into a baler. Near a driveway, an unemployed couple in a pickup truck dumps the day's collection of iron, found in abandoned lots in their neighborhood. In the warehouse, an operative manually sorts different alloys of brass plumbing fixtures on the basis of subtle color differences.

The average scrap-metal yard has about ten employees, few of whom are family members. Some are teenagers, some are semiskilled immigrants, and a few are construction workers who are between jobs. Wages are low, perhaps twice the minimum, but the work is steady. Experience, particularly in the sorting of alloys, is valued and rewarded. For younger workers, the job provides an opportunity to learn how to operate and repair heavy equipment. Many operatives in the Goldstein scrap yards, like welder Jaime Valdez, see themselves as apprentices, who will soon strike out on their own.

Opportunity for new entrepreneurs (like Valdez) is likely to arise, because the third generation finds scrap processing a messy business. Like Harry, most of the children of Sam Goldstein's colleagues entered the professions. Many of the founders who struggled to leave a thriving business to their descendants were disappointed. As they reached the age of retirement, the founders had difficulty in selling out. Most of the value in their business was intangible and not easily transferable; it consisted mainly of their knowledge of markets, costing, and pricing.

Sam was more fortunate. His son Scott, who received his MBA from Wharton, was attracted by the challenge of being his own boss. Daughter Jennifer, who received a law degree from NYU, dreaded the thought of working in a strait-laced law firm in New York. Aware of the problems her father was having with the new environmental regulations, Jennifer felt her legal knowledge would

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give the company a competitive edge. She convinced her husband, a mechanical engineer, to join the family business.

While members of the third generation lacked the instinctive market sense of their father and grandfather, Goldstein Metals nevertheless entered a new era. Jennifer bought some yards from their retiring competitors, along with their supply channels. Scott wanted to move forward into minimill operations. Because the capitalization required for a minimill is about ten times that needed for a shredder, only about a tenth of the nation's three-score minimills are spin-offs of scrap-processing firms. Scott negotiated a partnership with several outside investors; they built on a site adjacent to his shredder. The partners knew that they could easily slice away large segments of the market from the outmoded integrated mill in Philadelphia. Having been reared on his grandfather's tales of ethnic slights, Scott anticipated the sweetness of revenge.

Recycling the automobile

In order to justify the investment in the shredder, the Goldsteins must be assured of an adequate feedstock. The automobile is the largest source of ferrous scrap, and the second largest source of aluminum (after beverage cans). Goldstein Metals assigns a broker to maintain supply lines with dozens of automobile dismantlers, recyclers with ethnic roots and traditions of their own. The broker regularly visits the dismantling yards to emphasize the specifications: no upholstery or tires, which have no recycling value; no batteries or mufflers, which contain toxic lead.

The broker finds the facade of John Husak's auto-dismantling yard indistinguishable from those of most retail shops in this blue-collar suburb. The entire ten-acre facility is landscaped and surrounded by a wooden fence. While not typical of automobile dismantlers, John's operation is indicative of things to come. Having inherited the lot from his father, a part-time mechanic, John wears a three-piece suit while he supervises polite clerks, who keep track of inventory on microcomputers.

John capitalizes on the proclivity of most American males to tinker with their cars. Ninety percent of his revenue is earned by selling parts cannibalized from wrecks. The sign in the backyard admonishes: THIS IS NOT A JUNKYARD. IT IS A RECYCLING FACILITY. Like the scrap yard, the auto-dismantling yard is a mine above ground.

John might pay an insurance company up to $1000 for a late-model car that has been wrecked in a collision. Old cars brought in

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by tow trucks or owners might cost him $50. The crew works with the same equipment that an auto body shop uses, with overhead racks and cutting torches. First they extract those parts and fluids for which there is great demand. Then they mine the aluminum, copper, and zinc, which sell by the pound. Aluminum manufacturers provide a book that helps the crew locate these metals. The men carefully remove the catalytic converter, whose precious platinum sells by the ounce. John reads the daily *American Metal Market* to learn the selling prices of various metals in different cities. The price determines how much effort should be spent in picking the carcass clean of aluminum, copper, stainless steel, and zinc.

What remains of the average wreck is a ton of iron and steel. Turnover is continual. Once a week, John flattens the hulks for easy transport to a scrap processor. Smaller dismantlers await the arrival of a mobile "crusher," which buys the hulks, flattens them on the spot, and trucks them to the shredder. Sometimes John phones a "traffic broker," who links dismantlers and scrap processors. Truckers seeking a back-haul within a 100-mile radius may learn from the broker that flattened cars are available in Atlanta for shipment to Goldstein's shredder.

In today's scrap-recycling industry, even the legendary junkyard dog has an agent. At closing time, a truckful of cages pulls up to John's yard bearing fearsome pit bulls or German shepherds. After completing the night shift of guard duty, the canines are chauffeured home.

The advent of the minimill

In the past decade, the most striking success in the revitalization of America's basic industries has been the emergence of the steel minimill. Minimills can now produce steel rods, beams, and coils for about a hundred dollars per ton less than large, integrated steel mills. This is a price difference of about 25 percent. More important in the long run, American minimills are internationally competitive at the exchange rates prevailing in the late 1980s. They can deliver products to American consumers more cheaply than Japanese integrateds, and at about the same cost as German, Korean, Japanese, or Brazilian minimills. At current (summer 1988) exchange rates, the American minimill is a redoubtable competitor.

Until the late seventies, the primary-metal industry was epitomized by large, integrated steel producers that extract pig iron from

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ore, transform the liquid iron into steel, and then manipulate the steel into a large number of semi-finished products, such as wire, bars, and sheets. While the average blast furnace of an integrated firm has an annual capacity of 2 million tons, the minimill has an average capacity of 100 thousand. The efficiency of the minimills stems from the existence of the electric-arc furnace (EAF), which lends itself to efficient operation in small-scale production. An important metallurgical characteristic of the EAF is its ability to rely entirely upon scrap as a feedstock, obviating the need to make pig iron from ore.

In addition to their smaller size and use of the electric-arc furnace, minimills are distinguished from integrateds by two other characteristics. First, each minimill specializes in a much narrower range of products than an integrated mill. Because minute doses of "tramp" metals (such as copper and chromium) increase the rigidity of steel, only pure scrap can be used to make the sheets that will be bent and hammered into appliances and automobiles. Consequently, minimills generally concentrate on making lower-value rods and beams. As a result of research sponsored by the scrap-processing industry, this barrier is on the verge of being overcome. If the research is successful, new and major markets for scrap iron will open up.

Second, the integrated mills have traditionally congregated in four states—Illinois, Indiana, Ohio, and Pennsylvania. Minimills are dispersed all over the country, closer to markets that provide both demand for their products and scrap for their furnaces. The minimills thus enjoy a decided advantage in accessibility to southern and western markets.

The EAF is not a new technology. It was developed around the turn of the century when the open hearth furnace was being used in steel making. In the mid-1950s, the steel industry began replacing the open hearth furnace with the basic oxygen furnace, which utilized less energy and labor, produced steel ten times faster, and required less scrap than the open hearth furnace. As late as 1963, the electric arc furnace was producing more steel than the basic oxygen furnace.

Why did the steel industry make the strategic decision to invest in the basic oxygen furnace even though scrap-based steel making used less energy? Industry critics attribute this decision to the "gigantomania" of the oligopoly, which protected itself from external competition by tariffs, and from internal competition by fixing prices.

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Another explanation for the steel industry's commitment to the basic oxygen furnace is that neither the scrap nor the electricity required by the arc furnace was especially cheap. In the late 1950s, the cost of high-quality scrap averaged 70 percent of the cost of pig iron, which had superior purity (and hence the metallurgical properties suitable for the full range of product specifications). In the Midwest, electricity has been fairly costly compared with coal, the main energy source for making pig iron. The integrated steel industry, however, did not respond quickly when cost conditions changed.

The profitability of minimills

When the first minimills were built in the 1950s, they did not seriously threaten the survival of the integrateds. Through the early 1970s, the cost of purchasing and melting scrap in an electric-arc furnace was not much different from the cost of making hot steel through the basic-oxygen process. While total steel demand continued to grow, the expansion of the tiny minimill sector was barely noticed by the operators of integrateds. In the past decade, however, the minimill has become a major force in the American steel industry. By now, minimills have only one-seventh of the total capacity of the steel industry, but they account for at least one-fifth of the production.

The advantage of minimills over integrated mills has been attributed to low, non-union wages, to more flexible work rules, and to a selection of low-quality, "easy-to-make" products. Hourly wages are about 20 percent lower and man-hours per ton of output about 50 percent lower in minimills. Labor costs account for a $70 per ton difference between the cost of integrateds and that of minimills.

Differences in labor costs alone, however, cannot account for the emergence of the minimill. Until the early 1970s, the labor-cost differential was not enough to offset the higher costs of purchasing and melting scrap in the electric-arc furnace. The decisive change has been the decrease in the price of scrap.

The investment of scrap processors in magnetic cranes, balers, shears, and shredders during the past twenty-five years has dramatically reduced the cost of separating, sizing, and grading iron. In the early 1980s, high-quality scrap cost only 35 percent of what pig iron cost, down from 70 percent in the late 1950s. The low cost of scrap accounts for almost one-third of the $100 difference in cost per ton of output between minimills and integrateds.

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This difference understates the importance of the cheap scrap supply. If scrap costs had not fallen in the past decade, the minimill would not have been able to compete with integrated firms, much less stave off foreign competition. Because scrap is so inexpensive, the integrateds have increasingly adopted the technology of the minimills. Today, the electric-arc furnace accounts for nearly 40 percent of the output of the entire steel industry.

The profitability of the EAF technology encouraged a new group of entrepreneurs to enter the steel industry. Some of them were frustrated middle managers in integrated companies. A few were processors, like the Goldsteins, who wanted to expand the outlets for their own scrap. These new entrepreneurs have proven far more receptive to experimental approaches to steel production than have the operators of the integrateds.

Minimill operators have pioneered continuous casting, an innovation that is independent of the technology for making liquid steel. Instead of pouring the metal into ingots, which are cooled and then reheated for rolling into sheets, minimills cast the hot metal directly into finished products. The integrated steel producers lagged by about ten years in adopting continuous casting; they have also been much slower than their Asian and European competitors in expanding EAF capacity.

Working conditions in the minimill are not pleasant. Like scrap processing, steel making is a dirty business. Entering a minimill can be a frightening experience. Sparks from the electrodes fly around. Flames lick the catwalks connecting various sections of the plant. Cranes carry ladles of 2500-degree liquid steel overhead. The noise is deafening, and dust obscures visibility. The working areas, which are open to the air, are sweltering in the summer and freezing in the winter.

Steel making has always been dangerous work, and work in today's minimill is no exception. While minimill owners pay lower wages than those of unionized integrateds, they were pioneers in profit-sharing plans and in more democratic labor relations. Such organizational innovations were anathema to owners of the traditional integrated mills.

Some analysts believe that the revitalization of basic industries depends upon the introduction of "high technology." The revitalization of the steel industry, however, cannot easily be associated with a single innovation comparable to the invention of transistors, integrated circuits, or fiber optics. Instead, productivity gains are the result of a steadily improving old technology (the electric-arc

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furnace); a modest process innovation (continuous casting); a more productive system of processing scrap; and, to an unmeasured extent, better labor relations. The whole process of revitalization could be reversed if the scrap supply encountered a bottleneck. Given current environmental policy, this is not inconceivable.

Recycling and regulation

Despite rhetorical support for recycling, government has never treated the scrap-processing industry as kindly as its competitor, the mining industry, which provides the raw materials for virgin metal. Mining industries have enjoyed the advantage of depletion allowances that effectively reduce the relative price at which virgin metals can be sold. Since regulated railroad rates were based upon ability to pay, the bargaining power of the large mining industries resulted in lower tariffs for ore than for scrap. Mining industries rarely had to pay for the environmental costs of land disruption. But scrap processors never received an economic return for performing a public service: cleaning up the environment. With recent tax reforms, rail deregulation, and regulations on mining, these disabilities of the scrap-processing sector have diminished.

While their activities predate environmental regulations, recycling industries actually do the regulators' work quite well. New disabilities, however, are being imposed upon the scrap-processing industry. Paradoxically, the implementation of environmental laws aimed at dealing with hazardous wastes threatens the ability of the recycling industry to continue reducing environmental contamination.

Many consumer products contain hazardous substances. Cadmium is used for the protective coating of ferrous surfaces and for coloration; antimony is used for strengthening aluminum in some foreign cars; and automotive batteries contain lead plates. All three heavy metals are highly toxic. Refrigerators and washing machines made in the early 1970s contained electronic components impregnated with toxic PCBs, which served as coolants. These hazardous substances may be liberated in the process of recycling.

Jurisprudence and environmental science do not always define reality in compatible terms. Under the common law or the applicable statutes (the Resource Conservation and Recovery Act and Superfund), hazardous substances are not classified as "wastes" until the products are taken out of use. Although hazardous substances would be injected back into the environment in the absence

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of recycling, the manufacturers are not held legally accountable for damage caused by the substances' inevitable disposal.

Scrap processors are recipients of hazardous substances embedded in products they did not manufacture. The processor may be technologically incapable of detecting and separating toxic heavy metals that are chemically bonded into components. Nevertheless, the processor who shreds chromium-plated bumpers, batteries, or cadmium-laced vinyl may be legally defined as a generator of hazardous waste.

Processing hazardous waste imposes upon a recycler the burdens of costly regulation and extensive legal liabilities. Thus scrap processors who shipped batteries from dismantled automobiles to a lead-recovery plant (which is now bankrupt) are being forced to pay for the cleanup.

The risks and costs of environmental regulation can also reduce incentives to recycle objects containing materials that are currently or likely to be classified later as "hazardous." Indeed, when the EPA threatened to recognize waste oil from dismantled cars as hazardous, the highly efficient waste-oil refining industry simply closed its doors until the threat disappeared. Obviously, these rejected materials do not simply evaporate; they may merely be disposed of surreptitiously.

When the EPA in one region threatened to classify shredder fluff as hazardous (because of the PCB content of old appliances), scrap processors across the country refused to accept heavy appliances. Municipal-landfill operators panicked, realizing that they would be burdened by the bulk of these appliances, which would still contain the PCBs. In several regions, a least-cost solution was found, in which scrap processors were not held accountable for any PCB contamination. The recycling of appliances resumed.

Cars and appliances that are junked today were manufactured a decade or more ago, and society must cope with the hazardous materials they contain. Placing the onus for cleanup on the recycling industry raises the industry's costs and reduces its competitive advantage over producers of virgin metals. A regulation-induced cost squeeze on scrap-metal recyclers will undoubtedly dampen the expansion of the nation's thriving minimills.

Policy options

Encouraging regulators to reach a least-cost solution in the face of existing waste streams is only a short-term solution. The long-term solution involves modifying the nature of future waste

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streams, in order to render them less hazardous. How can this be done?

The guiding philosophy is that the cost of materials to manufacturers should reflect the downstream cost of disposal or detoxification. If a material is economically recyclable, then the downstream cost may be negligible. Of two alternative materials that cost the same to produce, the one that is recyclable is cheaper than the one that must be discarded.

Once this principle is enunciated, the following questions arise: What is the optimal materials mix? What institutions can achieve this optimum? Let us explore these questions for three classes of potentially hazardous constituents of automobile scrap: the technologically indispensable, the economically indispensable, and the dispensable.

Technological indispensability. A technologically indispensable constituent has no feasible substitutes. An example is the lead-acid battery. Potential competitors include constituents with other hazardous materials, such as the nickel-cadmium battery, which may be even more toxic. Other indispensable constituents include brake fluids and antifreeze, which are inherently hazardous but easily containable.

A reasonable policy cannot ban the use of technologically indispensable constituents. Battery recycling seems amenable to market solutions, such as requiring a refundable deposit at the time of purchase. If potential liabilities associated with battery crushing and secondary lead smelting discourage recycling, the government may have to offer an indemnity for battery recyclers who meet reasonable standards of care.

Economic indispensability. An economically indispensable constituent is not essential, but its addition to the value of the useful product more than offsets its potential harm to the environment. An example is galvanized, or zinc-plated, metal. Galvanizing steel extends the life of the automobile, and thus reduces the rate of materials outflow from the automobile into the environment. When galvanized steel is recycled in an electric-arc furnace, the zinc dust is captured with other hazardous air pollutants. The dust is currently buried in hazardous-waste sites, a practice that the EPA plans to ban. If the full cost of containing and recovering the zinc were added to the cost of the automobile, it is doubtful that consumers would prefer ungalvanized, rust-prone cars to galvanized ones.

Another economically indispensable but hard-to-recycle constituent is plastic, which is replacing metals. Plastics have been attrac-

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tive because they reduce vehicle weight. Even if automobile purchasers ultimately had to pay the disposal cost of the plastic, it is unlikely that they would prefer a heavier car made of steel. A disposal tax may render plastic-recycling technologies more profitable.

Dispensability. Some hazardous materials have fairly low-cost substitutes that are less hazardous. Unleaded gas can be substituted for leaded. Cadmium anti-corrosives can be replaced by plastics, and cadmium-based tints in upholstery by other colorants. Antimony, which is hazardous to smelters, can be replaced by strontium as an agent for strengthening aluminum.

One possible policy is the outright banning of dispensable hazards, as is done with lead. Sweden has banned the use of cadmium in automobiles. An attractive option to automobile workers might be the banning of Japanese cars, because they use antimony in their bumpers. The strategy of banning on the basis of alleged hazard, however, can easily be used by special interests wishing to restrict competition.

An alternative policy is an effluent charge, based upon some estimate of the harm caused by the substance. One difficulty with this approach is that hazardous substances comprise such a small proportion of an automobile that a charge might not even be noticed by the consumer. Another is that estimates of harm are at best imprecise, and may be subject to political manipulation.

The social benefits of recycling

The complex scrap-metal recycling system that has evolved in the past three generations encompasses scavengers and automobile dismantlers, mechanized scrap processors and steel minimills. The degree of success in metal recycling has been impressive: scrap processors currently recycle about one-half of the iron, lead, and zinc, and about one-fifth of the aluminum, discarded in the United States each year. The system produces about $6 billion worth of ferrous products and $2 billion worth of copper, aluminum, lead, and zinc. It has proven highly adaptable to the changing mix of materials discarded by American consumers—in particular, to the waning use of steel and waxing use of aluminum.

The metal-recycling system has offered untallied opportunities for income and entrepreneurship to individuals with little capital. Two generations of Jews played a major role in developing this system. As the third generation leaves the industry, opportunities are opening up for other groups. The capital requirements remain modest. One can become a collector with a pickup truck, and expand

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into wholesaling by acquiring a back lot. From today's scrap-yard operatives will no doubt emerge many of the new scrap entrepreneurs.

The scrap-metal recycling system has evolved in response to profit incentives, despite governmentally imposed disabilities. The system provides public services for which it receives no compensation: cleaning up the environment, conserving energy, and facilitating the revitalization of the basic-metals industry. Productivity improvements in scrap processing have facilitated the rise of the steel minimills. Without the efficient scrap-processing industry, it would no doubt have been necessary for America to consume more energy and import more steel.

Despite the contributions of scrap recycling to conserving energy and resources, current environmental policies jeopardize its viability. In the course of recycling discarded objects such as automobiles and appliances, some hazardous substances are released on the premises of the processors. While these substances would be released even if junk were simply thrown away, the scrap-metal recycling industry is being required to pick up the cleaning tab. The heightened costs and risks are discouraging further investment in recycling equipment. Instead of blaming an industry that did not create the hazardous chemicals in the first place, the correct long-term solution is to make manufacturers bear the costs of disposal or detoxification.

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